SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.

RICHARD A. McGEE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, AND ROBERT A. HEINZE, WARDEN, CALIFORNIA STATE PRISON FOR MEN, AT REPRESA, CALIFORNIA, PETITIONERS,

vs.

JAMES NELS EKBERG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 1]

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, NINTH CIRCUIT, SAN FRANCISCO, CALIFORNIA

JAMES NELS EKBERG, Petitioner,

vs.

RICHARD A. McGEE, Director, California Department Corrections, et al., and Robert A. Heinze, Warden, California State Prison for Men, at Represa, California, Respondents

APPLICATION AND PETITION FOR THE WRIT OF HABEAS CORPUS AD SUBJICIENDUM AND AD TESTIFICANDUM

The Honorable William Denman, Chief Judge, Ninth Circuit Court of Appeals of the United States,

Greetings:

Comes now James Nels Ekberg, a citizen of the United States and the State of Kansas, and of legal age and hereinafter referred to as petitioner, in propria persona, and in Forma Pauperis and respectfully applies to the Honorable William Denman, Ninth Circuit Court of Appeals of the United States, Chief Judge, thereof, in good faith, for a writ of Habeas Corpus, Ad Subjiciendum and Ad Testificandum, and as grounds for the issuance of the said writ of Habeas Corpus, by this, his verified petition, upon oath, the said James Nels Ekberg, set forth the causes of action as follows:

[fol. 2] Your petitioner declares and alleges, that he is illegally restrained and imprisoned in the California State Prison, Represa, California, and deprived of his liberty and freedom by the hereinbefore named Respondents, to wit: Richard A. McGee, Director California Department Corrections and Robert A. Heinze, Warden, California State Prison, Represa, California, and, that such restraint and imprisonment, pursuant to a trial proceedings, Judgments, Sentences and commitments upon Petitioner im-

posed, May 18, 1949, in the Superior Court, Division Six, Sherry, J. San Diego County, San Diego, California, is illegal and repugnant to the due process clause of the Fifth and Fourteenth Amendments of the Federal Constitution and the said trial court was without Jurisdiction of an alleged offense of an alleged Federal Prior Conviction as charged, and without jurisdiction to proceed to trial on the issues, and exceeded Jurisdiction, as will be shown, in the entire Trial proceedings, Judgments, Sentences and Commitments, and, further, in ordering for trial, the joinder of separate, distinct alleged offenses, of different dates, of entirely different class, charged and filed seperate and distinct by the District Attorney of said San Diego County, California, on seperate dates, distinct Information No. 151944, with making and drawing a non sufficient fund check, Cal. P.C. 476 A, and in a seperate and distinct Information No. 152470, possession alleged firearms, with an alleged Federal Prior Conviction, supra, charged thereto, [fol. 3] which the said District Attorney charged had never since been reversed, annulled or set aside; And that the said Judgments, Sentences and commitments, in which the said trial court ordered consecutive terms, are null, illegal and void, and that petitioner was tried, convicted and imprisoned thereunder, without reasonable or probable cause, and without being duly convicted, and in violation of the terms and provisions of the Thirteenth Amendment to the Federal Constitution, Clause I; by the State of California, acting by, and through its duly authorized agents, the said District Attorney and the trial Court of San Diego County, San Diego, California, and by virtue of certain gross Deprivations of petitioners rights, privileges and immunities as guaranteed by the Fourteenth Amendment, such being violative of the Federal Amendments to the Constitution of the United States of the Fifth Amendment, Sixth Amendment, Eighth Amendment, Thirteenth Amendment, Fourteenth Amendment.

Specific causes of Action and Allegations

Without limiting, precluding, or in any manner modifying the foregoing allegations or any part therefo; your petitioner shows and alleges that:

[fol. 4] (a) As a cause of action in and before the Honorable Federal Courts, and which establishs jurisdiction;

(b) Your petitioner has used all State legal remedies available to him, and that the Courts of the State of California have heretofore denied to him, either a fair trial or fair appeal and denied him his application for Habeas Corpus without hearing or resolving the Federal questions therein set forth, what-so-ever; and, that he is entitled to commence and maintain said action in Habeas Corpus in and before this honorable Court of the United States, pursuant to the terms and provisions of Title 28 (Judicial Code) Sec. 2241 (a) (2) (3) (5); Sec. 2242 (d) as will be shown; sec. 2243 (a to h); sec. 2254 (a); Price vs. Johnson 9 cir. 1947, 161 Fed. 705, certiorari granted 1947, 331 U.S. 804, 67 S. ct. 1557; Salinger v. Loisel (1924) 265 U.S. 224, 233, 231 44 S. ct. 519 68 Ed. 989; Sanders vs. Shaw 678 S. Ct. 638;

(c) And complying with sec. 2242 (d) Judicial Code, title 28 U.S.C. supra, that the state courts of California have as a fact and truth imposed a judgment and sentence and decided a federal decision and a statute of an act of Congress, Title 18, Sec. 76, and imprisoned your petitioner there-under, without jurisdiction and without reasonable or probable cause and in conflict with the decision and mandate of the United States Court of Appeals, First Circuit, Ekberg v. United States 167 F2d 380 at P. 387, 12: 13: 14, P. 388-389 (1948) and in conflict with the act of Congress Statute, Title 18 Sec. 76 U.S. Code, and from which, information, trial proceedings, said judgment, sentence, decision, and [fol. 5] imprisonment, he is now serving illegally there-under, is based upon said conflicting decision by the California State Courts, supra, as shown in points and causes of action contained in the verified petition for writ of Habeas Corpus, and statement of facts and will be further conclusively and completely established and substantiated at hearing and by documentary proof-evidence.

And that petitioner is illegally imprisoned there-under, and to be further shown, and that he is entitled to a hearing forthwith, and that the Honorable Presiding Judge of the District Court of the United States, Northern District of California, and is in the jurisdiction of your petitioners place of imprisonment, said Honorable Court now being absent from said District Court, and will be for some time (per newspaper reports) that the case Ekberg vs. the United States 167, F2d 380, 387, 12; 13: 14, 388, 389, has heretofore been decided and determined by three justices of the Honorable United States Court of Appeals, First Circuit, supra, and res judicata, and that this Honorable Court should therefore resolve the facts, law and issues presented herein and as contained in said petition for writ of Habeas Corpus and a show cause order be issued to said respondent and your petitioner be heard in the interest of right and justice.

INTRODUCTION

Petitioner respectfully submits herein, for the Petition for Writ of Habeas Corpus, his allegations and statement of Facts, points and Authorities, which he partially relies [fol. 6] upon for the Writ to issue, except for such facts, testimony and documentary evidence, that is relevant, material and necessary to his cause of action, which must and will be on a hearing, completely substantiated by testimony and documentary proof in evidence, orally as well as is written, in which it will be shown conclusively and entirely that petitioner was illegally tried, convicted and committed to prison, without lawful, reasonable nor probable cause and he is ipso facto, illegally imprisoned there-under, in a mode and manner, repugnant to the constitution as follows, towit:

One

The trial court was without jurisdiction of an alleged prior conviction as charged in Information No. 152470, namely "Impersonation of a U.S. Officer;" which was not committed by petitioner, and is not, in itself, and as charged in information No. 152470, supra, an offense of the Statute and Act of Congress, Cr. Code Sec. 32; U. S. C. A. Sec. 76, in the case of Ekberg vs. United States 167 F2d. 380, 387 (12:13:14) and which case the district attorney of San

Diego County, California, charged, had never since been reversed, annulled or set aside; nor is a valid prior conviction shown in either judgment, sentence or commitment No. 152470.

Petitioner submits that the Information No. 152470, supra, does not show a valid prior conviction which was in Fact "Reversed", as cited in Ekberg v. United States, 167 F2d 280, at page 387 (12) and in Baas v. United States, 25 F 2d Page 295, the court held:

[fol. 7] "It was not sufficient to charge that the accused 'falsely pretended to be an officer of the United States' with intent to defraud a named person." (Emphasis, underscoring supplied.)

At page 387 (13:14) Ekberg v. United States 167 F2d 380 the court said:

"Evidently the government was not prepared to prove any act in keeping with the pretense of being a public official". (This to be substantiated by documentary proof, which decision of the first circuit supra, was predicated and by additional facts and testimony at hearing.) See Exhibit A. Affidavit Ramon Seda, (Being forwarded this court under seperate cover, registered mail)

The first Circuit United States Court of Appeals, supra held: that petitioner did not commit the act of Impersonation of U.S. Officers as described in the first clause of the Statute U.S.C. 18, Sec. 76.

Petitioner declares and contends that the decision of the First Circuit in Ekberg v. United States 167 F2d 387 (12:13:14) p. 388, 389, is controlling, is a final decision and res judicata, and, in which the said United States Court of Appeals, supra, thereupon, forthwith issued a mandate, ordering petitioners discharge from prison.

Petitioner further contends, that the said charges in Information No. 152470, R.T. 24:25 did not therefore show any public offense had been committed whatsoever, and that therefore the said charge of the alleged (Violation [fol. 8] Deadly Weapon Act, Sec. 2) did in Fact and very truth adversely and evilly prejudice his cause before the Court and Jury, to the fatal detriment thereof, in the additional Information No. 151944, R. J. 23:24, by the illegal use of such evidence, on the charges in which no public

offense was shown, at the same time evidence was adduced in regards to Information No. 151944, by the wrongful joinder and consolidation of the two informations, supra, for trial.

Petitioner therefore contends that he is illegally imprisoned there under and he is justly and lawfully entitled to his liberty and freedom and the Writ should issue forthwith, and he should be ordered discharged from this illegal custody complained of, all other issues not withstanding.

Two

Information No. 151499, failed to charge an offense under Cal. P.C. 476a, where the Complainant testified that "He" was the author in the Making and Drawing of the Check supra, "R.T.P.36:L.6 to 21) and at R.T. 37 L. 9 to L 15 P. 38, complainant testified that "he knew the check to be No Good when he wrote it for Petitioners endorsement," R.T.P. 39, L.1 to L. 9) and that he knew petitioner "Was pretty well inebriated" and He testified petitioner "Wasn't in too good condition I would say," to write a check. (R.T. P.40 L. 1 to L. 8) and (R.T. P. 41 L. 19 to P. 42 L. 13) and that petitioner was "Incoherent" because of his inebraiation, and that the compainant did not deliver the flowers at [fol. 9] R.T. P. 38) "Emphasis underscoring supplied) R.T. refers to Record Transcript of trial proceedings.)

The Information No. 151944 is inconsistent to the Statute, Cal. P.C. Sec. 476a. Petitioner submits that here, there was no crime committed, as he was charged in an information No. 151944, supra, as defined under California Statute P.C. Sec. 26 which provides:

(4) Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

(5) Persons who committed the act with out being conscious thereof.

(6) Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

In this connection it is submitted that there was no crime committed by petitioner within the terms of the act Cal. P. C. 476a and P.C. Sec. 26, supra, and by the complainants own sworn testimony, supra, and petitioner was illegally charged and convicted, and the committing magistrate was ipso facto, without, power authority, or jurisdiction to hold this petitioner (defendant) to answer to the Superior Court on either charge, and the trial court was utterly without jurisdiction to proceed to hearing upon the issues involved under the Constitution and laws of the United States and State of California, and petitioner should be granted the writ of Habeas Corpus and be discharged forthwith, notwithstanding any and all other points.

[fol. 10]

Three

The trial court, Grossly, exceeded jurisdiction in the Joinder at the trial, of an alleged charge of the California Deadly Weapons Act, Sec. 2, on February 15, 1949, Information No. 152470, supra, which was filed by the District Attorney of San Diego County, California, on April 28, 1949, with the alleged charge of non sufficient fund check on February 14, 1949, Cal. P.C. 476a. Information No. 151944, which was filed by the said District Attorney, on April 7, 1949.

The joinder of said charges alleged in, and, by seperate informations was in fact prejudicial and one placed him in jeopardy of the other before the court and jury and was in fact a violation of the provisions of the Cal. P.C. Sec. No. 954,—Two or more offenses of the same class of crime may be joined together in one information or indictment, or tried together but not joined or tried together where the alleged offenses are of entirely different class, in seperate and distinct Information or Indictments of seperate and Distinct dates entirely foreign to each other. This is well settled in Fact and in law, People ex rel Tweed v. Liscomb 60 N.Y. 559-19 am Rep 211 P226 and other cases cited; and in U.S. v. Sebo 101 F2d 889-891; and in Re. Henry 123 U.S. 372, 8 S. Ct. Rep. 142.

For this extremely prejudicial act on the part of the prosecution with consent of the trial court, but not of the peti-

[fol. 11] tioner (defendant) the said trial court, did in fact, abrogate it's powers and jurisdiction to proceed to trial on the issues and petitioner should therefore be forthwith discharged, not-with-standing any and all other points and allegations herein made, the said various act, not being "Due process of law" within the purview of the Fourteenth Amendment of the Constitution and like provisions of the California Constitution Art. 1, sec. 13.

Four

Petitioner Deprived of Counsel of His Own Choice

On February 16, 1949, petitioner, without counsel was arraigned before a magistrate on compaint of the charge filed by the District Attorney of San Diego County, California, of alleged non sufficient fund check on February 14, 1949, sum of 19.82 to a San Diego florist for a bill of flowers and the telegraph charges, to telegraph the flowers to Kansas City. At the out set of the proceedings, Petitioner (then defendant) informed the court that he was a stranger in the city, that he was not acquainted with any attorneys in the city or state of California, and that he desired permission to write air mail his attorney, Charles W. Bartlett Esq. 49 Federal Street, Boston 10, Massachusetts, to aid him in engaging a reputable counsel in San Diego, to aid him in legal advice and represent him. Whereupon the magistrate directed petitioner to an assistant District Attorney, present in the court room, whom informed petitioner, this was a proceeding to set bail from what he knew of the case, it was doubtful whether or not a crime had been [fol. 12] committed, that it was a habit of some merchants in the city, to be over zealous in making sales and such facts would be determined upon a preliminary hearing and after the District Attorney's Office had received the so called F.B.I. record and the court would direct the jailor to permit petitiooner to contact and engage counsel or the court would see to it, that petitioner had counsel. Bail was set at two thousand dollars and petitioner remanded to jail in absence of bond. Following which petitioner, several times daily by jail formality of card request to the county jailor, endeavored to obtain services of a reputable Attorney. The chief jailor (named Bunker) said to petitioner:

"Don't worry the court or District Attorney that you talked to, will send you an attorney," at which time petitioner handed jailor Bunker an air mail letter addressed to his attorney: Charles W. Bartlett, Esq. Boston, supra for mailing, in which petitioner had equested said Attorney Bartlett to assist petitioner by mail, through legal channels in the engagement of the services of a reputable attorney in San Diego. Immediately following mailing of said letter and on the next day, one B. J. Brown called petitioner to the jail office and identified himself to petitioner as being "A very good lawyer" saying "I have looked into your case and there is nothing to it, you will be out in no time, I have already talked to the District Attorney and Court and I have taken your case." Petitioner then wrote a letter to a friendly acquaintance, a prominent San Diego businessman whom visited the petitioner at the jail, stating that he would cover and pay the sum of the check and ar-[fol. 13] range on release, for petitioner's fare to his home in Kansas City. Following, which he informed petitioner by letter, that he had talked to the attorney, B. J. Brown, whom he had "asked him" to "hold off" covering the check until attorney B. J. Brown talked to the District Attorney (See APP.I. Early, month of April, 1949, one Alex. L. Cory Esq. of the law firm of Price, Nottbusch, Cory and Schwartz, 426 San Diego Trust and Savings Bldg. San Diego, California called to see petitioner at the jail in response to a request from Attorney Charles W. Bartlett of Boston, Mass. The attorney B. J. Brown was present in the jail office interviewing a client. Petitioner informed Attorney A. L. Cory that he desired his services and had started to explain his case when attorney B. J. Brown, interrupted the interview with his client and came over to when attorney Cory and petitioner was talking, and Brown said to Attorney Cory: "I am taking care of Ekberg's case," which petitioner at no time verified. Whereupon attorney Cory said: "I can't do anything for you Ekberg, if Mr. Brown is representing you," whereupon petitioner replied "Wait I want you to represent me, Mr. Cory." Attorney Cory then said: "Well, Brown said he was handling your case and that lets me out." See App. III, thereafter petitioner was unable to engage the services of any other attorney. Attorney B. J. Brown continuo*sly* telling petitioner

that he would not get more than ninety days (90) and to let him handle the case. Two days before the trial Attorney [fol. 14] B. J. Brown sent petitioner word by a visitor that petitioner would get only about 90 days, even if found guilty at trial, as both cases would be misdemeanors.

By virtue of the foregoing facts and the deceit and subterfuge practiced upon your petitioner (then defendant) as above shown, he was in fact, deprived of counsel in an identical manner as was excariated in the cases of: People v. Salas, 80 Cal. App. 319; (1926) People v. Napthaly, (1895) 105 Cal. 641, 39 Pac. 29; It is far more incongruous in the instant case, for the petitioner to so have been deprived of counsel, than in the Napthaly case, supra, inasmuch, Napthaly was an attorney at law and you- petitioner a mere layman, with no knowledge of the int*racacies* and techniques of the law, and that such acts and deprivations of counsel of his own choice, who was Alec L. Cory, in fact, was not due process of law, nor equal protection of the law, and the deprivation of your petitioner's rights. Privileges and immunities coming within the purview of the Fourteenth Amendment, People v. Avilez, 86 C. A. 2d 292, 294 (1948) Powell v. Alabama 287 U. S. 45, 58.

Five

Denial of Defense Witnesses

Several days prior to the trial petitioner executed a list of witnesses, in which he served notice in writing to Attorney B. J. Brown, counsel and to the Court Authorities [fol. 15] (Jailors) that he wished to subpoen*eaed* for his defense at the trial. The Pastor of the First Lutheran Church San Diego, California, came to the jail on several occasions, in response to requests of petitioner and of his family in Kansas City, and who, desired to testify in petitioners defense at the trail. These demanded defense witnesses were not subpoe*oned* and on the day of trial May 10, 1949, petitioner was informed by Attorney B. J. Brown, supra, that the said defendant witnesses were not called as he and the court authorities failed to see where the demanded witness could be of any benefit to petitioner. During the trial proceedings, in open court. petitioner, over the objection of Attorney B. J. Brown, counsel, en-

deavored futilely, to explain these facts to the trial jury R.T. 177, with the fact that the alleged prior conviction as charged had been reversed, whereupon, Attorney B. J. Brown said to the court: "Your honor, this is without sanction on my part," R.T. 177. The court upon motion of attorney B. J. Brown and the District Attorney ordered the jury dismissed from the court room, R.T. 177:178:179:180 and the court harshly reprimanded petitioner. Elsewhere supported by the Record Transcript of the trial, the court ordered petitioner to answer to questioning only after pause for any objection of the District Attorney, R.T. 128:129:145, and had been passed on by the court. All of which was not "due process of the law" or equal protection of the law and was a foreclosure on the right to defendant and speak for himself, in person even though he was facing a term to imprisonment and under the doc-
[fol. 16] trine set up by the United States Supreme Court in Boykin v. Huff, 73 App. D.C. 378, 121 F2d 865; the circumstances here are such that they constituted a violation of "Fundamental idea of fair play and justice in civilized society" per Mr. Justice Rutledge, in In Re: Oliver, 335 U.S. 257, 282 (1948) your petitioner should, in fact, be discharged from this illegal confinement, notwithstanding any or all other points or allegations, herein contained, Mandall v. People 76 Colo. 296, 231 Pac. 199.

Six

Gross Incompetency of Counsel Forced on Petitioner

The gross incompetency of counsel forced on petitioner is clearly evidenc*t* throughout the record and such Facts which to, "de Hors" the record, will be further and conclusively established and substantiated at hearing by documentary proof and testimony; Counsel was incompetent by reason of the following to wit: (1) Deprived petitioner of counsel of his choice by subterfuge, and coercion. (2) Informed petitioner "There is nothing to your case", and promised petitioner not more than ninety days jail at road camp sentence, even, if convicted as both charges could be considered misdemeanors by the court. (3) Refused to file petition for Writ of Habeas Corpus at petitioner's request, after petitioner was in jail longer

than sixty days awaiting trial. (4) Willfully neglected and *re-and* refused to subpoena petitioners defense witnesses. (5) Did not object when court made mis-joinder of offenses, such act as prejudicial and excess of jurisdic-[fol. 17] tion. (6) Told the trial jury in final argument that petitioner was technically guilty of possession of firearm Art. sec. 2. (7) In violation of Cal. P. C. Sec. 1203, counsel told the court petitioner (then defendant) was not eligible for probation in which the District Attorney corrected him, at arraignment for sentence. (8) Refused to apply or make motion to the court for mistrial upon misconduct of one of jurors. (9) Refused to apply or make motion for new trial as he said "It would cost too much." (11) Visited and was friendly with police officers and prosecution witnesses in the case, before and at the trial. Told petitioner not to contradict the officers or prosecution witnesses statements when petitioner took the witness stand in his defense and thus, fettered petitioner (defendant) in his defense. (12) Refused to permit petitioner to explain to the court jury of the reversal of the case Ekberg v. United States 167Fd-380, by the first Circuit U.S. Court of Appeals. When petitioner did attempt to explain in open court the prior conviction as charged was reversed, supra, counsel immediately inter-upted and stood up and said to the court: "Your honor I discussed that with the defendant and this is without sanction on my part" R.T. 177. (13) Counsel said to the court "The point that the defendant, your honor, what he insists upon reading,—I think Mr. DeFere (District Attorney) Will agree"—R.T. 177, this concerned the reversal of the said prior conviction, thus, clearly and obviously indicated that counsel had pro [fol. 18] forma agreement with the prosecution, to gain petitioner's conviction, and thus violated his canons (15) and code of ethics of his profession, to the fatal detriment of the petitioners cause. (14) Counsel thereupon misinterrupted and misstated to the court the truth and facts of the reversal of the prior conviction as charged, as decided by the U.S. Court of Appeals in Ekberg v. U.S. 167F2d-380 and said to the court R.T. 178:179 "There is nothing at all wrong with the First Sentence" and said, has "Not a thing" to do with this case" referring to the prior conviction as charged in Information No. 152470.

(14) After verdict of guilty by the jury, the court said to B. J. Brown counsel, to effect. You are a respected officer of this court and what you say about the defendant (petitioner) will be accepted by the court so we don't have to have a probation officer into this case. (15) Just before sentence was passed counsel stood up and told the court if defendant was sentenced to road camp he'd do about twenty months and wouldn't do more than that at San Quentin, thus inviting the court to, and directing them to impose prison sentence upon petitioner (defendant).

(16) At the outset of the trial, upon court misjoining the two cases, petitioner objected to the said joinder of offenses to counsel B. J. Brown, and said to petitioner, "Keep *quite*, as anything you say will prejudice you to the court and jury. (17) Counsel contrived with the court and District Attorney in pro forma appearance *un* Judges Chambers at commencement of trial, from apparent secret conference with the said trial court, this without previous [fol. 19] knowledge or consent of petitioner then defendant (Mandall v. People 76 Colo. 296, 231 Pac. 199. (18) These, and others, and further acts and or omissions upon the part of counsel B. J. Brown detrimented the cause of defendant, this petitioner, to be later shown at the hearing on the Writ of Habeas Corpus to be had, all of which in the aggregate, is analoguous to types of cases, explored as to the actions of counsel by the Federal Supreme Court, and the instant case sounding particularly within the provisions of the doctrine set up in Johnson v. Zerbst, 304, U.S. 458, 463, 467 and Hawk v. Olson, 326 U.S. 271, 278; all of which said acts and omissions tended to the fatal detriment of petitioners cause, to the ultimate conclusion of having in fact been a mere Pro Forma trial and not in truth "Due Process of Law" within the purview of the Fourteenth Amendment. The writ should issue and petitioner should be discharged from the illegal confinement which he now suffers through the gross mockery upon justice and visited upon petitioner. (Further and complete facts with documentary proof and testimony to be substantiated at hearing concerning this portion.)

Seven

The Trial Court, Discriminately and Prejudicial placed Petitioner (Then Defendant) twice in jeopardy for same offenses and that: (1) the Court ordered joinder of offenses, and information No. 152470 with Information No. 151944, in same trial proceedings without consulting defendant (peti- [fol. 20] **tioner) or counsel R.T.26) (2) The court ordered petitioner to answer to questions only after pause for objection by District Attorney and passed on by the court. (R.T. 128:129) (3) The court refused probation hearing, upon being informed, petitioners was so entitled, by the District Attorney, that defendant (petitioner should have pre sentence hearing or probation report, where upon the court replied to effect: This court does not have faith in the Probation office reports of San Diego County R.T. 320.321 (4) The District Attorney recommends that the sentences be concurrent R. T. 323) The court ordered the sentences consecutive R.T. 340.) (5) The Trial Judge had Star Chamber conference with counsel B. J. Brown and the District Attorney on morning of May 10, 1949, before commencement of trial. (6) Other and further denial of "Due process of law" is well supported by the very record in that; the trial judge having passed judgment and sentence in a mode and manner inconsistent with the Statute, on the 17th day of May 1949, with trial counsel present R.T. 323 did thereafter (purportedly) indicated by R.T. 1, on the 18th day of May, 1949, forthwith imposed a second judgment and sentence upon petitioner (then defendant) R.T. 335, while his regular court appointed counsel B. J. Brown was not present and who was in fact and in truth out of town on a purported fishing trip; as a subterfuge for counsel, the court appointed an Attorney, Conway, who was not familiar with petitioners case what-so-ever and not of the previous sentence, and who, upon, without any notice,** [fol. 21] **stood in the stead of petitioners regular court appointed counsel, B. J. Brown (a) This purported appointed counsel Conway did not in any manner interpose passing of sentence this second time upon petitioner (then defendant) and who had no more familiarity with the case than a new born babe. (b) Thus your petitioner was actually placed in double jeopardy by the trial court without benefit**

of a jury trial, in violation of the Fifth Amendment of the Federal Constitution. (c) For, if, upon the said trial courts own finding, that the First judgment and sentence was illegal and void, which was tried before a jury, then therefore, petitioner was there entitled to a new trial under the Constitution of the United States. (d) And therefore, the second and final judgment and sentence being predicated upon the said courts findings of the illegality of the first judgment and sentence, was in fact, a star Chamber proceeding in its entirety and a total deprivation and denial to this petitioner of "Due Process of Law" and equal protection of the laws the said act being in fact, pro forma, and a galloping type of justice ipso facta in a corum non judice, and all other points and allegations not withstanding, under the doctrine set up in the U.S. Supreme Court in that famous Chambers v. Florida 309 U.S. 227, 236, 237, OP. Black J.) (e) Your petitioner in fact and in truth has had no trial what so ever, under the Constitution of the United States. (f) This is not a case ube non judicium, or non incertium est, because of the fact that the record conclusively and inconvertibly speaks for itself and it is [fol. 22] upon the record that your petitioner relies in support of this contention. (g) Petitioner should be in fact be therefore forthwith discharged from this illegal confinement and restored to his lawful liberty and freedom. Chambers v. Florida, 309 U.S. 227, 236, 237, supra Johnson v. Zerbst 304, U.S. 458, 467, 58 S. Ct. 1019, 92 L. Eal 1461; Carter v. Texas 117 U.S. 442, 447.

Eight

Petitioner did not have proper appeal and was in fact shackled and fettered in the court of appeals. (1) While petitioner had his appeal pending and after filing his opening brief (personally prepared by petitioner a mere layman) he requested to be brought before the court of appeals to argue in favor of his cause. This application to appear in person was preemptorily denied by the court see APPIII attached (past) and such was in fact, a denial of "due process" and equal protection of the laws and being there and then repugnant to the terms and provisions of the Fourteenth Amendment. (2) Thereupon petitioner,

petitioned the court of appeals for appointment of counsel, learned in the law to represent him at the time his cause (appeal) should come on for hearing: this application for appointment of counsel was denied by the appeals court. This, being another and further denial *fo* "Due process and equal protection of the laws" and repugnant to the terms and provisions of the 14th Amendment to the Federal Constitution See APP IV (Past) (3) That your petitioner was entitled to be present in person or by, with counsel, [fol. 23] has been here-to-fore decided by the Federal Supreme Court to be a denial of a right under the Constitution of the U.S. Price v. Johnston 9 Cir U.S. 1947, 161 F2d 705, 331 U.S. U.S. 804, 67 S.Ct. 1757 (certiorari Granted) Powell v. Alabama 287 U.S. 45, 58 People v. Avilez 86 C.A. 2d 292, 294 (1948) People v. Napthaly (1895) 105 Cal. 641 39 Pac. 29; United States v. Bergamo, 154 F 2d 31,32 (1946) See APP V (past) (4) Further the assistance of counsel is a right guaranteed by the Sixth Amendment of the Federal Constitution, and Art. 1, Sec. 13, California Constitution, as well as statutes made and enacted, pursuant thereto. (5) Further, Section 1265 California Penal Code, precludes the Reversal of a lower court—"Where there is no appearance for the appellant" Thus, the court of Appeals—knowing the petitioner was in prison and without counsel, refused him the right of appearance and counsel, to the foregone conclusion of affirmation of the lower courts order committing him to prison, thus, in fact shackling and fettering your petitioner of and in the full prosecution and not a fair prosecution of his appeal, which petitioner relies and stands upon the record of the court of appeals in the case of People v. Ekberg, 4 Crim 728 and hereby invokes the protective prohibitions of the fourteenth amendment of the Federal Constitution. (6) Again submitting, that he should be therefore forthwith discharged notwithstanding any and/or all other points and allegations herein set forth, of the dignities of Human Rights and in accordance with the Constitution and laws of the U.S. of America.

[fol. 24] Nine

Petitioner further alleges that he has taken the following actions since his illegal conviction: (1) Appeal: Nov.

14, 1949, People v. Ekberg, 4th Crim 728 D.C.A. (2) Application for rehearing denied November 26, 1949. (3) Petition for hearing of appeal California Supremem Court denied in Banc, December 12, 1949. (4) Application for rehearing denied Dec. 21, 1949. (5) Petition for Writ of Habeas Corpus, Cal. Sup. Ct. Ekberg v. People etc. Robert A. Heinze, Warden, et al. No. 5086. Denied without inquiry or hearing March 16, 1950. (6) (a) Application for Writ of Certiorari in the Supreme Court of the United States No. 456 Miscl to: the Fourth District Court of Appeal and Supreme Court of California, Ekberg v. People etc. 4 Crim No. 728. and Robert A. Heinze, Warden, etc., et al, to the Supreme Court of California No. 5086 Denied without hearing May 29, 1950 by U. S. Supreme Court.

Ten

Petitioner further alleges: That the State of California Courts have in fact denied him and deprived him of "Due Process of Law" ab initio and that his conviction and imprisonment is ipso facto illegal and unconstitutional. That he is a layman ill versed in the law and that counsel should be appointed and assigned to aid and assist him in the further prosecution of his application for the Writ of Habeas Corpus for which he has attached hereto (Post) applications for appointment of such counsel for such purposes. Therefore the Writ of Habeas Corpus should be granted in the interests of right and justice and his application for said Writ is respectfully submitted.

[fol. 25]

Eleven

Additional Records Necessary

Your petitioner has need of additional records and documents that are material to the issues involved, that said records are filed with and in the Supreme Court of the U. S. for which petitioner has made request to the said Supreme Court to file the same with and in this Honorable Court of Appeals of the U. S., Honorable William Denman, Chief Judge thereof, and that certain documentary proof in which the decision of the Honorable first Circuit U. S. Court of appeals in the case Ekberg v. U. S. 167 F. 2d 380-

387 (12:13:14) was predicated and conclusively established facts of exoneration in said case page 387 (12:13:14) supra, and as charged in information 152470, of said prior conviction supra, and that said documents affidavit of one Roman Seda of Puerto Rico bearing Revenue Stamp No. 216347 and at the present time in possession of petitioners family in Kansas City and who, petitioner has requested and directed to mail said affidavit via registered mail to this honorable court to further substantiate petitioner's statement of fact, "point one," and exoneration of said charge as contained in said information No. 152470, and as set forth in his petition for Writ of Habeas Corpus, And, that this Petition may be further amended as may be proper.

Twelve

Conclusion and Submission

In conclusion, your petitioner submits that he has not in fact had a fair trial and he is imprisoned and deprived of [fol. 26] his liberty and freedom in violation of "Due Process of Law" of the Fifth and Fourteenth Amendments of the Constitution of the United States and of the doctrine set up by the United States Supreme Court, in that famous case, *Cah*mbers v. Florida, 309 U. S. 227, 236, 237, supra, and that, in truth, in the instant case before the Bar of this Honorable Court, Petitioners contention of fact and law is conclusively and irrevokably set forth and established in his case, Ekberg v. United States, 167 F. 2d, 380, at 387, (12:13:14) and 388, 389 and further definitely substained by the documentary proof of one Ramon Seda photostat copy of affidavit bearing Revenue Stamp No. 216347 (Exhibit A) being furnished to this Honorable Court registered Mail, supra, and which decision of the First Circuit, United States Court of Appeals, was predicated. And the illegal misjoinder of the two separate informations at the trial was fatal detriment to his cause. Petitioner having been deprived of visit to his approved friends and who were friends of his family, to see petitioner to arrange for counsel (see in Haley v. Ohio 332 U. S. 596 S. Ct. (1948). Therefore a show cause order should issue to the respondents herein named to -how cause as to why petitioner

should not be forthwith discharged from his illegal imprisonment and custody.

Therefore the Court s-ould appoint counsel, to aid and assist him in the full and complete prosecution of his cause [fol. 27] in the interest of Right and Justice. Petitioner should be granted relief and his discharge ordered.

Respectfully submitted, James Nels Ekberg, Petitioner In Propria Persona, Box A-12038, Represa, California.

Duly sworn to by James Nels Ekberg jurat omitted in printing.

[fol. 28] Prayer for Relief

Wherefore, Your humble petitioner, the said James Nels Ekberg, respectfully applies to the Honorable William Denman, Chief Justice of the Circuit Court of Appeals of the United States of the Ninth Circuit and in pursuant to act of Congress made and provided therefore, and humbly prays that a writ of habeas corpus issue, directed to the said respondents Richard A. McGee and Robert A. Heinze, Warden of the California State Prison for Men, at Represa, California, and commanding them, the said Richard A. McGee and Robert A. Heinze, to have and bring the body of the said James Nels Ekberg, before and into the said Honorable Court, Circuit Court of Appeals of the United States, Ninth Circuit, San Francisco California, or in such Federal Court Room at such time and plade as may be designated by the Court; and the said Richard A. McGee and Robert A. Heinze, Warden, be required to then and there show cause, good and sufficient to this Honorable Circuit Court, of the United States of America, as to why the said James Nels Ekberg, should not be *forthwith Discharged* from custody of the said Richard A. McGee and Robert A. Heinze, Warden, and released from the said California State Prison for men at Represa, California, at such time and place as the said Court and Judge thereof; should do and direct, and to do and receive whatever shall be ordered, concerning the said James Nels Ekberg, and the said Richard A. McGee and Robert A. Heinze, Warden, to

[fols. 29-30] have then and there said writ with a copy of said commitments whereby they hold the said James Nels Ekberg, in custody, and that the said District Court of the United States of America and Judge thereof; Discharge the said James Nels Ekberg, from such custody, and order and secure his release from such restraint and the said Richard A. McGee and Robert A. Heinze, Warden, to do and abide by the order of the said Court and Judge presiding therein, Deo Juvante.

Petitioner will Ever Pray.

Respectfully Submitted, James Nels Ekberg, Petitioner In Propria Persona, Box A-12038 Represa, California.

[fol. 31] IN UNITED STATES COURT OF APPEALS

MOTION FOR APPOINTMENT OF COUNSEL

To the Honorable William Denman, Chief Judge, Ninth Circuit — of Appeals of the United States, Greetings:

I

Comes now, James Nels Ekberg, the petitioner herein, in propria persona, and respectfully represents to the Court, that he is a layman ill advised in the law, that he has no funds with which to employ counsel; and has been deprived visit of friends that wished to aid him in employing counsel, and in his cause, further substantiated at his hearing; and that petitioner needs counsel to aid and assist him in prosecution of his cause that he firmly believes in good faith, to be meritor-ous.

II

Wherefore, upon these premisis, your petitioner respectfully applies to the Court and Judge thereof; for the appointment of competent counsel to aid and assist him in these matters, that right and justice may be arrived at.

Respectfully Submitted, James Nels Ekberg, Petitioner.

Duly sworn to by James Nels Ekberg jurat omitted in printing.

[fol. 32] IN UNITED STATES COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF

To the Honorable William Denman, Chief Judge, Ninth Circuit Court of Appeals of the United States, Greetings:

Comes now the above named petitioner, James Nels Ekberg, in Propria Persona and respectfully applies to this Honorable Court, of the United States of the Ninth Circuit Court of Appeals, in good Faith, for leave of the Court to file an Application for the writ of habeas corpus, ad Subjiciendum and Ad Testificandum and to proceed therein before the Court in forma Pauperis with the prosecution of his cause, in which it will be shown that he was placed on trial for alleged offenses without reasonable nor probable cause, that there were gross deprivations of this petitioner's inherent rights, provileges and immunities, guaranteed unto him by the constitution of the United States of America, the deprivations, supra, having taken place prior, during and subsequent to his trial and thereafter.

The petitioner has attached hereto, (Post) Affidavit in Forma Pauperis in Liew of costs, and for intents and purposes shown.

Wherefore Petitioner Will Ever Pray,

Respectfully Submitted, James Nels Ekberg, Petitioner, Box A-12038, Represa, California.

[fol. 33] UNITED STATES OF AMERICA,
State of California,
County of Sacramento, ss:

Affidavit

Petitioner, James Nels Ekberg, who having been first duly sworn and subscribed upon oath, deposes and says, that: he is a citizen of the United States and a citizen of the State of Kansas by virtue of birth and he is of legal age, and that he is the petitioner herein named and the petitioner named in the foregoing and atrached applica-

tion to file and proceed in Forma Pauperis in the prosecution of his application for the writ of habeas corpus, Ad Subjiciendum and Ad Testificandum, that he comes with good cause and in good faith, the said application for the said writ of habeas corpus being hereto attached (Post) in which the said James Nels Ekberg, being one and the same person as the herein named affiant and petitioner, is therein named as the same petitioner.

That he is entitled to commence and maintain said action in habeas corpus in and before this said Honorable Court of the United States, pursuant to the terms and provisions of Section 237, Title 28, U. S. Code Ann. U. S. Judicial Code and Sec. 2241 (a) (2) (3) (5) U. S. Judicial Code. Title 28, Sec. 2242(d) (Sec. 2243) Sec. 2254 (a) U. S. Judicial Code.

That the nature of his cause of action will be concisely set out in the said application for the said writ of habeas corpus to be so filed in and with said Honorable Court of [fol. 34] the United States, Ninth Circuit, if such leave be granted for consideration therein.

That this affidavit in Forma Pauperis is made and entered that he may avail himself of the rights and privileges guaranteed unto him by the Federal Constitution and upon the authority of: Congressional Act of July 20, 1892, 27 Stat. Chap 209 and as amended June 25, 1910, chap 435, 35 Stat. L. 866, section 832, tit*el* V. S. C.; (Judicial Code) See Lathan v. United States 210 Fed. 159; Boyle v. Great Northern R. R. Co. 63 F. 539, Rule 8, Federal Rules Criminal Procedure.

That petitioner, James Nels Ekberg, is without funds and he is endowed with no property, real or otherwise to prepay the costs of filing and prosecution of the said habeas corpus proceedings in the Honorable Court, of the Ninth Circuit Court of Appeals of the United States and he is unable to furnish bond in lie*w* thereof.

Wherefore: The Petitioner, James Nels Ekberg, respectfully prays of the Honorable Court that the said costs may be waived as though said costs had been fully paid, and that he may be permitted to file and proceed in Forma Pauperis in the prosecution of his cause to be therein shown

in the said application for the said writ of habeas corpus, Deo Gratias.

Further Affiant Sayeth Not.

James Nels Ekberg, Affiant.

Sworn and subscribed to before me this 12th day of July, 1950 A. D. Edward L. Yee, Notary Public. My Commission Expires 7-6-54.

[fol. 35] UNITED STATES OF AMERICA,
State of California,
County of Sacramento, ss:

AFFIDAVIT OF SERVICE BY MAIL

James Nels Ekberg, the petitioner named herein in the attached petition for writ of habeas corpus total number 36 pages, with and including appendix, said James Nels Ekberg, petitioner, aforesaid, being duly sworn and upon oath, deposes and says that he has placed in the care and hands of the Institutional Officials of the California State Prison, Represa, California, a copy of the said petition for the writ of habeas corpus and exhibits thereof (appendix) properly addressed, postage paid by petitioner, to place in the United States Mail for: Hon. Fred N. Howser, Attorney General, 600 State Building, Sacramento, California, Attorney for Respondents, et al.

James Nels Ekberg, Petitioner, In Propria Persona, Box A-12038, Represa, Calif.

Subscribed and sworn to before me this 12th day of July 1950 A. D. Edward L. Yee, Notary Public. My Commission Expires 7-6-54. (Seal.)

[fol. 36] APPENDIX "I"

G. S. Parsons Co.

Welding Supplies

Telephone J-0955 2931 Kettner Boulevard

San Diego, California

March 4, 1949

DEAR JIM:

I was out of town the first part of the week, and just received your two letters.

This thing is not going to be as simple as it first looked. Apparantly the D. A. is not throwing out the concealed weapon charge after getting your F. B. I. record, and therefore my covering the bad checks will not get you out of the clink.

I talked to Mr. Brown and he thought if I cover the check, he could get you released but asked me to hold up until he could talk to the D. A. I talked to the D. A. myself and he said under normal conditions he would go along on this basis but in view of the other record he was reluctant to do so. I will again check with Mr. Brown and see if there is any new developments.

Sincerely, G. S. Parsons.

[fol. 37] APPENDIX "II"

Price, Nottbusch, Cory and Schwartz

426 San Diego Trust & Savings Bldg.

San Diego 1, Calif.

June 19, 1950

In reply to your letter of June 10, 1950, please be advised that I received a letter under date of March 28, 1949, from Charles W. Bartlett, Esquire, of the firm of Ely, Bartlett, Thompson and Brown, 49 Federal Street, Boston 10, Massachusetts, asking me to call upon you at the San Diego County Jail where you were awaiting arraignment on charges concerning a bad check and possession of firearms.

I did call upon you early in April and was advised that B. J. Brown, Esquire, was representing you.

Very truly yours, Procopio, Price, Nottbusch, Cory and Schwartz, by (S.) A. L. Cory.

ALC:dd.

[fol. 38]

APPENDIX "III"

IN THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT, STATE OF CALIFORNA

San Diego, September 26, 1949

Crim. No. 728

PEOPLE, etc.,

vs.

JAMES NELS EKBERG

By the COURT:

Application for order directing appearance of defendant and Appellant in Court to orally argue appeal in above cause, is Denied.

Dated: September 26, 1949.

Griffin, Acting P. J.

APPENDIX "IV"

San Bernardino, November 9, 1949

Crim. No. 728

PEOPLE, etc.,

vs.

JAMES NELS EKBERG

By the COURT:

The Petition of appellant for appointment of attorney to represent him at hearing and oral argument of the above entitled cause, is Denied.

Dated: November 9, 1949.

Barnard, P. J.

[fol. 39] E. J. VERDECKBERG.

Clerk of the District Court of Appeal in and for the fourth Appellate District of the State of California, do hereby certify that the proceeding and annexed is a true and correct copy of an order of September 26, 1949 denying application of defendant "Ekberg" to orally argue appeal, and an order dated November 9, 1949 denying petition of defendant "Ekberg" for appointment of attorney; each of said orders having been made in the case of People, etc., vs. James Nels Ekberg, 4 Crim. No. 728—as shown by the records of my office.

20th day of June A. D. 1950.

E. J. Verdeckberg.

[fol. 40] APPENDIX "V"

Ely, Bartlett, Thompson & Brown

49 Federal Street

Boston 10

August 4, 1949.

Mr. James N. Ekberg, Box A-12038, San Quentin, California.

DEAR MR. EKBERG:

I have your letter of the 30th. In view of Mr. Kenny's letter and that of the District Attorney of San Diego County, both of which I have received. I don't see that there is anything further I can do that will be of any assistance. There is no sense in my explaining to the chairman of the Parole Board the significance of your case before the Circuit Court of Appeals as reported in 167 F. 2nd.

I will say this, and you can pass this thought along to anyone you see fit, that I am shocked to know that the State of California will permit a situation to exist in which a man who is in prison and feels he has legal rights that should be asserted and has no money to hire his own attorney may not be furnished with one, either through the office of a public defender, a legal aid society, a voluntary defender's com-

mittee or Court appointed counsel. I am confident it couldn't happen in Massachusetts.

[fol. 41] I am not passing this along to the San Diego District Attorney or Mr. Kenny because I don't want to prejudice any possibilities you may have of getting legal counsel. However, as I have said above, you are at liberty to convey these thoughts to anybody you see fit.

Very Truly Yours, Chas. W. Bartlett.

[fol. 42] APPENDICES

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 456 Misc.

JAMES NELS EKBERG, Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

On consideration of the petition for the Writ of Certiorari herein to the Supreme Court of the State of California

It is ordered by this Court that the said petition be, and the same is hereby denied.

May 29, 1950.

June 15, 1950. A True Copy. Test.
Charles Elmore Cropley, Clerk, by Harold B. Willey, Deputy.

[fol. 43] Title of Court and Cause

To: The Honorable Fred M. Vinson, the Chief Justice and Associate Justices of the Supreme Court of the United States.

GREETINGS:

Comes now the petitioner James Nels Ekberg, herein and represents to the Court that he has this day of 12th July 1950 A. D., verified an application for writ of habeas

corpus to the Honorable William Denman, Chief Judge, Circuit Court of Appeals of the United States, Ninth Circuit, Federal Building, San Francisco, California, under provision of Title 28, Judicial Code, Sec. 2241 (a), Sec. 2242 (d), Sec. 2243, Sec. 2254 (a) U. S. C., and that there are certain records on file with and in this Honorable Supreme Court of the United States, which are material and necessary to the issues involved in said habeas corpus action, supra.

Therefore, in these premisis, your petitioner respectfully applies to the Court for said records, to be certified to and filed with and in said Circuit Court of Appeals of the United States, Ninth Circuit to the Honorable William Denman, Chief Judge, to be returned to this Honorable Court, upon disposition of the cause therein to be considered and determined in accordance with the law and rules of this Honorable Court, for which a praecipe to the clerk of the Court is hereby attached. (Post)

Respectfully submitted, James Nels Ekberg, Petitioner.

[fol. 44] Title of Court and Cause

Praecipe to the Clerk

The Clerk of the United States Supreme Court will please certify and file with and in the Circuit Court of Appeals of the United States, Ninth Circuit, to the Honorable William Denman, Chief Judge, thereof; Federal Building, San Francisco, California the following records which are now ledged in this Honorable Court in the herein above shown cause to wit: (1)Transcript of trial record 346 pages (2) Clerk's record trial court about 30 pages. (3) respondents reply brief on appeal 4 Crim. 728 (4) Copy petition for writ of Certeirari People v. Ekberg etc. with copy of amendment filed thereto (5) Copy petition for writ of Habeas Corpus copy denial thereto from California Supreme Court; Ekberg on Habeas Corpus No. 5086 (6) Copy petition for hearing of appeal No. 728 California supreme court (7) Copy of letter of Ch-rles W. Bartlett Esq. Attorney at law 49 Federal St. Boston 10, Mass. (RE: effort to obtain

counsel) (8) Copy for Writ of aid and assistance to Calif. Sup. Ct. RE: Ekberg on Habeas Corpus No. 5086. (9) Copy denial of order denying cert*ar*iari No. 456 misc. These records are material and necessary to the issues involved in the Habeas Corpus referred to in petitioners application for the records attached hereto (ante.

Respectfully submitted, James Nels Ekberg, Petitioner in propria persona, Box A-12038, Represa, California.

(10) Please include both Transcripts of Preliminary Proceedings No. 151944 and No. 152470.

[fol. 45] IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. 456 Misc.

AFFIDAVIT OF VERIFICATION

UNITED STATES OF AMERICA,
State of California,
County of Sacramento, ss:

James Nels Ekberg, who, having been first duly sworn and subscribed deposeth and on oath sayeth: That he is the petitioner named in the foregoing and attached application and Praecipe for certain records addressed and directed to the United States Supreme Court and that all statements of fact therein set forth are true of his own knowledge, and that said records are in fact material and necessary for the intents and purposes shown Further Affiant sayeth not:

James Nels Ekberg, Affiant.

Sworn and su-scribed to before me this 12th day of July, 1950 A. D. Entered in Notary Book No. P 28 L 18. Edward L. Yee, Notary Pulbic, State of Calif., County of Sacramento. My Comm. Exp. 7-6-54. (Seal.)

[fol. 46] In the Circuit Court of the United States, Ninth Circuit

Hon. William Denman, Chief Judge

Federal Building,
San Francisco, Calif.

To: Mrs. Betty Ekberg, 715 Washington Blvd., Kansas City 2, Kansas.

In the Matter of James Nels Ekberg for Writ of Habeas Corpus as: Affidavit of Ramon Seda of Puerto Rico Bearing Revenue Stamp No. 216347

You will please forward to Honorable William Denman Chief Judge Ninth Circuit Court of Appeals of the United States, Federal Building, San Francisco, California, via registered mail as follows:

1. Photostat copy of affidavit of one Ramon Seda of Puerto Rico bearing stamp No. 216347 said phot-stat copy of affidavit concerning James Nels Ekberg.
2. Said Photostat copy of said affidavit to be assigned for use as Exhibit A in "point one" of the petition for Writ of Habeas Corpus to the above said court in said entitled case and cause and until final judgment and adjudication of the said cause.

Respectfully submitted, James Nels Ekberg, Petitioner in Propria persona, Box A 12038, Represa, California.

Subscribed and sworn to before me this 12th day of July 1950. Edward L. Yee, Notary Public. (Seal.)

[fol. 47] In the United States District Court for the Northern District of California

Order Denying Right to File Petition for Writ of Habeas Corpus—July 21, 1950

Ekberg transmitted to the Honorable William Denman, Chief Judge of the United States Court of Appeals for the Ninth Circuit, an application for the writ of habeas corpus,

Judge Denman, pursuant to Title 28 U. S. C. Sec. 2241(b), transferred the application to the United States District Court for the Northern District of California for hearing and determination.

It appears that the defendant was convicted of two charges in the state court and that the judgment of conviction has become final. He is now serving under the judgment two consecutive sentences in a California State Prison.

He has heretofore applied for the writ of habeas corpus to the Supreme Court of the State of California, apparently upon the same grounds as are alleged in the instant petition. The Supreme Court of the State of California has denied him relief under his petition to that court. Thereafter he applied for certiorari to the United States Supreme Court. The United States Supreme Court had denied that application. He had therefore exhausted his state remedies. [fol. 48] Where a state court has considered and adjudicated the merits of a petitioner's contentions a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. The state of California accords remedies which give due process of law and there is nothing alleged which presents "exceptional circumstances of peculiar urgency" which entitle him to the issuance of the writ. Ex parte Hawk, 321 U. S. 114; ex rel. Kennedy v. Tyler, 269 U. S. 13. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered. Huffman v. Smith, 172 F. 2d 129.

Dated: July 21, 1950.

Dal M. Lemmon, United States District Judge.

(Endorsed:) Filed Jul. 31, 1950. C. W. Calbreath, Clerk.

[fol. 49] IN UNITED STATES DISTRICT COURT

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE AND APPEAL OF THE ORDER DENYING HEARING AND ISSUANCE OF WRIT OF HABEAS CORPUS AND THE DENIAL OF RIGHT TO FILE THE PETITION IN FORMA PAUPERIS

To: The Honorable Dal M. Lemmon, Judge, United States District Court, Northern District of California, Northern Division.

I

Comes now James Nels Ekberg, the Petitioner herein, in propria persona, and respectfully states that he has been grieviously injured by the order of the above entitled Court, denying him the right to file and proceed in Forma Pauperis on application for Writ of Habeas Corpus. Therefore, Petitioner desires to appeal from said order denying the said right to so file and proceed in Forma Pauperis.

II

There has never been a resolvement or adjudication of the Federal Question involved on their merits, by this or any other Court, State or Federal, upon a proper hearing and presentation of the evidence *which positively is of* "exceptional circumstances of peculiar urgency". Sanderlin v. Smyth (C. C. A. 4) 138 F. 2d 729; Sanders v. Shaw (Ha 1917) 224 U. S. 317, 37 S. Ct. 638, 61 L. Ed. 1163; United States v. Patterson (C. C. N. J.) 29 Fed. 775; Ex Parte [fol. 50] Berman (D. C. Md.) 14 F. Supp. 716; Hawk v. Olson, 326 U. S. 271, 90 L. Ed. 61, 66 S. C. R. 116; Revig 145 Neb. 306, 16 N. W. 2d 181.

The several documents attached to the petition for habeas corpus as evidence of the "denial of counsel" clearly indicates on the face of the petition and record that this gross denial of due process of law of both the State and Federal Constitutions have *not yet* been considered, determined or adjudicated by either the State or Federal Courts and clearly is an issue of "circumstances of peculiar urgency". Ex Parte Farley (C. C. Ark.) 40 Fed. 66; McCrea v. Jackson (C. C. A. 6) 148 F. 2d 193.

III

The petition for the Writ of Habeas Corpus was transferred to this Honorable Court for hearing and determination (line 23, 24—page 1, order, U. S. D. C.).

IV

Petitioner has exhausted his State remedies, (L. 4, page 2, order, U. S. D. C.) therefore, he has no other adequate or available remedy for relief in the State Courts. Sanderlin v. Smyth (C. C. A. 4) 138, F. 2d 729, supra.

V

Petitioner is imprisoned in the California State Prison under color and for an act and Statute of the United States Congress Title 18, Section 76, which act has heretofore been determined, not to have been committed by Petitioner, by the United States Court of Appeals, First Circuit, Ekberg [fol. 51] v. United States, 167 F. 2nd 380, 387, 13:14. See in Bass v. United States, 25 F. 2d 295. Petitioner thereunder is entitled to the right of a hearing and adjudication which on the face of the record represents "gross exceptional circumstances of peculiar urgency". Title 28, Section 2241 (2) Ex Parte Royall, 117 U. S. 241, 29 L. Ed. 868, 6 S. C. R. 734; Cunningham v. Neagle, 135 U. S. 1, 34 L. Ed. 55, 10 S. C. R. 658.

VI

Wherefore, your petitioner respectfully requests a certificate of probable cause to issue to the United States Court of Appeals, for the Ninth Circuit, Title 28 U. S. C. A. 1291, 2107; P. L. 773, Chapter 153 on habeas corpus and all other Constitutional and Statutory provisions concerning such appeals. House v. Mayo, 324 U. S. 42, 89 L. Ed. 739, 65 S. C. R. 517; White v. Rogen, 324 U. S. 760, 89 L. Ed. 1348, 65 S. C. R. 978.

Respectfully submitted James Nels Ekberg, Petitioner.

Duly sworn to by James Nels Ekberg. Jurat omitted in printing.

[fol. 52] In United States District Court

Certificate of Probable Cause—August 18, 1950

Since there is a justiciable problem involved in this case I hereby certify that there is pro-able cause for this appeal.

Dated: August 18th, 1950.

Dal M. Denman, United States District Judge.

[File endorsement omitted.]

[fol. 53] In United States District Court

Order Allowing Appeal—August 16, 1950

After due consideration by the Court of Petitioner's Affidavit and Application for an Appeal in Forma Pauperis, It Is Ordered, pursuant to Certificate of Probable Cause this day filed, that appeal may be taken herein.

[fol. 54] In United States District Court

Notice of Appeal and Assignment of error on Appeal From the U. S. D. C. Order of the Denial of Writ of Habeas Corpus No. 555 Misc. U. S. D. C.—August 21, 1950

To: The Honorable Dal M. Lemon, Judge, United States District Court, Northern District of California, Northern Division.

I

Comes now James Nels Ekberg, the petitioner herein, in propria persona, and in forma pauperis and files notice of appeal on the merits of his petition for writ of habeas corpus and from the order denying hearing and issuance of the writ and the denial of the right to file the petition for writ of habeas corpus and to proceed in forma pauperis.

Wherefore, petitioner having shown good and valid cause and good faith in a meritorious action for the writ of habeas corpus by virtue of the Honorable Court and Judge

thereof, having issued a Certificate of Probable Cause for Appeal to the United States Court of Appeals, Ninth Judicial Circuit, and to the Honorable Chief Judge and Associate Justices thereof, for a full and complete determination and adjudication of, and on, the writ of habeas [fol. 55] corpus and the merits therein contained with exhibits and records in support thereof, as provided by Section 2253 Title 28 U. S. C. Section 1291, 2107, P. L. 773 Chapter 153 on habeas corpus, and Section 262 of Judicial Code 28 U [illegible]. Section 377, 28 U. S. C. A. Section 377 and all other Constitutional and Statutory provisions concerning such appeals—House v. Mayo, 324 U. S. 42, 89 L. Ed. 739, 658 S. C. R. 517 and cases cited therein.

And: In re: 620 Church Street Corp. 299, U. S. 24, 26, 57, S. Ct. 88, 89, 81 L. Ed 16 and cases cited.

Respectfully submitted, James Nels Ekberg, Petitioner, In propria persona, Box A-12038, Represa, California.

Dated: August 21, 1950.

[File endorsement omitted.]

[fol. 56] In United States District Court

Assignment of Errors—Filed August 24, 1950

To: The Honorable Dal M. Lemmon, Judge, United States District Court, Northern District of California Northern Division.

Petitioner, James Nels Ekberg, in propria persona, herein respectfully states and assigns the following errors in the order denying the petition for writ of habeas corpus, to wit:

I

The Honorable Court and Judge thereof, grossly erred in denying hearing and adjudication on the merits as contained in the petition for writ of habeas corpus and supported by the exhibits, documents and records in evidence, upon the said petition and records being transferred

to the Honorable Court for hearing and determination (page 1, line 23, 24—order U. S. D. C.)

II

The Honorable Court and Judge thereof grossly erred in denying issuance of the Writ that petitioner had exhausted his State remedies, page 2, line 4, order U. S. D. C. and he had no other adequate nor available remedy for relief in the State Courts.

III

The Honorable Court and Judge thereof grossly erred in that the petition for writ of habeas corpus is meritorious in the allegations as contained in said petition, points [fol. 57] "one", "two", "three", "four", "five", "six", "seven", "eight", "nine", "ten", "eleven", and "twelve", and supported by the evidence, and that there has never been a hearing or adjudication of petitioners allegation of true facts, by any court state or federal in the federal questions presented and contained in the said petition for habeas corpus and which are deemed to be true; Williams v. Kaiser, 323 U. S. 471, page 473, 474, 65 S. Ct. 363, at page 365.

IV

The Honorable Court and Judge grossly erred in denying the filing of the said petition for writ of habeas corpus in a meritorious cause of action and in denying the hearing and full adjudication of his cause and of such facts which de hors the record and of the denial of due process of law by the state courts.

A certificate of probable cause has been issued by this Honorable Court for appeal for full and complete adjudication on the merits of his petition for writ of habeas corpus and as provided by the Constitution and amendments thereto and laws made and enacted pursuant thereto; White v. Ragen 324, U. S. 760, 89 L. Ed. 1384, 65 S. C. R. 978.

Respectfully submitted, James Nels Ekberg, Petitioner, Box A-12038, Represa, California.

[File endorsement omitted.]

[fol. 58] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR THE CERTIFIED RECORDS—August 21, 1950

Will the Clerk of the United States District Court, Northern — of California, please prepare, certify and deliver to and file with the Clerk of the Court of the United States Court of Appeals Ninth Circuit, at San Francisco, California, the complete records, documents and the verified original petition for writ of habeas corpus and copies thereof on file in the habeas corpus case of James Nels Ekberg, Petitioner, vs. Richard A. McGee, Director, California Department of Corrections, et al., and Robert A. Heinze, Warden, California State Prison, Represa, California, Docketed as No. 555, Misc., and that the said complete records may be transferred to the said Clerk of Court United States Court of Appeals for the Ninth Circuit, San Francisco, California, forthwith as listed below:

1. Copy original verified petition for writ of habeas corpus and copies thereof.

2. Copy order of U. S. D. C. of denial thereof.

3. Copy notice of appeal and application for certificate of probable cause dated August 7, 1950, to U. S. D. C.

4. Copy application for certificate of probably cause to Honorable William Denmon, Chief Judge, U. S. C. C. A., dated August 14, 1950.

[fol. 59] 5. Copy of Certificate of probable cause issued by Honorable Dal M. Lemon, U. S. D. C.

6. All records filed by United States Supreme Court.

7. Document of records consisting of photostat copy of affidavit, Ramon Martinez Seda, bearing revenue stamp No. 216347 Puerto Rico, as exhibit 'A' point one of habeas corpus petition.

8. All exhibits and records filed by petitioner concerning Denial of counsel by State of California Courts, filed with habeas corpus petition.

9. Copies United States Congress Bill H. R. 8603, as exhibit 'B' concerning point one habeas corpus petition (these were forwarded to Honorable William Denmon, Chief Judge, U. S. C. C. A. August 11, 1950 and August

15, 1950 concerning illegal imprisonment of U. S. Officer by U. S. C. C. A. first Circuit, 167 F. 2d 380.

10. Any and all other records that may be on hand concerning the case and cause.

11. Notice of Appeal.

Respectfully submitted, James Nels Ekberg, Petitioner, Box A-12038, Represa, California.

Dated: August 21, 1950.

To the Clerk U. S. D. C.: Please acknowledge transfer of complete records.

[File endorsement omitted.]

[fol. 60] In United States District Court

Order Extending Time to Docket Appeal—September 27, 1950

Good cause appearing therefore, it is Ordered that the time for docketing the appeal in the Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 27th day of October, 1950.

Dated: September 27th, 1950.

Dal M. Lemmon, U. S. District Judge.

[File endorsement omitted.]

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER OF SUBMISSION—April 13, 1951

Ordered appeal herein argued by Mr. Allan L. Sapiro, counsel for appellant, and by Mrs. Doris H. Maier, Deputy Attorney General, counsel for appellees, and on oral stipulation of said counsel, submitted to Denman, Healy and Orr, Circuit Judges, for consideration and decision.

[fol. 63] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—August 31, 1951

Ordered that the typewritten opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 64] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,709

JAMES NELS EKBERG, Appellant

vs.

RICHARD A. McGEE, Director, California Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California, Appellees.

On Appeal from the United States District Court for the Northern District of California, Northern Division

OPINION—August 31, 1951

Before Denman, Chief Judge, and Healy and Orr, Circuit Judges

DENMAN, Chief Judge:

This is an appeal from an order of the district court refusing to allow appellant Ekberg to file, in forma pauperis, an application for a writ of habeas corpus. The district court found that the applicant, a prisoner confined on a conviction of felony in the state courts of California, had exhausted his state remedies and that the Supreme Court of the United States denied certiorari to review the action of the Supreme Court of the State of California in denying his petition for habeas corpus. The brief of the appellee admits that the application for the writ in the district court presents no grounds which have not been presented heretofore in the action filed by appellant in the state court, namely, the petition for the writ of habeas corpus to the California Supreme Court.

The ground of the district court's decision is that, although the appellant had exhausted the state remedy in habeas corpus, he must nevertheless show exceptional circumstances to warrant the exercise of his discretion to [fol. 65] refuse to allow the filing of his application for the writ "if it appears that the applicant has no cause of action." Huffman v. Smith, 172 F. 2d 128, 130 (Cir. 9). Where an examination of the state record shows a cause

of action, the Supreme Court, in Hawk v. Olson, 326 U.S. 321, 326, requires its consideration in either of the following situations:

> "When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. White v. Ragen, 324 U.S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. Williams v. Kaiser, 323 U.S. 471; Tomkins v. Missouri, supra [323 U.S. 485]."

The district court declined so "to review the state proceedings," giving as its reasons: "Where a state court has considered and adjudicated the merits of a petitioner's contentions a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. The State of California accords remedies which give due process of law and there is nothing alleged which presents 'exceptional circumstances of peculiar urgency' which entitled him to the issuance of the writ. Ex parte Hawk, 321 U. S. 114; ex rel Kennedy v. Tyler, 269 U.S. 13. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered. Huffman v. Smith, 172 F. 2d 129."

We think the district court erred in holding exceptional circumstances must be shown before the federal court or judge may be called upon to exercise the discretion described in Huffman v. Smith, supra, 230. The applicable statute is 28 U.S.C. § 2254, providing:

> "§ 2254. State custody; remedies in State Courts
>
> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, *or that there is either an absence of available State corrective process or the existence*

of circumstances rendering such process ineffective to protect the rights of the prisoner.

[fol. 66] "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available process, the question presented." (Emphasis supplied.)

The italicized alternatives after the word "or" have no*t* application where, as here, there is an effective state remedy of which the applicant has availed himself. This construction of § 2254 is in accord with the prior holding in Ex parte Hawk, supra:

"The statement that the writ is available in the federal courts only 'in rare cases' presenting 'exceptional circumstances or peculiar urgency,' often quoted from the opinion of this Court in United States ex rel. Kennedy v. Tyler, supra, 17, was made in the case in which the petitioner had not exhausted his state remedies and *is inapplicable* to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right." (Emphasis supplied.)

It is so recognized in Darr v. Burford, 339 U. S. 200, 211.

The appellee also contends that appellant has not exhausted his state remedies because under the California Law a decision on a petition for the writ of habeas corpus is not res judicata of the issues raised by the petition and hence successive petitions may be filed making the state process inexhaustible. We do not agree that in California the process is inexhaustible. The contrary is decided in In re Horowitz, 33 Cal. 2d 534, 547, and in In re Browning, 99 Cal. App. 2d 337.

~~tion. That section is satisfied where the applicant for the writ has once availed himself of his state remedies~~.

Since the district court's only ground for the refusal to exercise the discretion above described is the absence of special circumstances, the judgment is reversed and the

court ordered to give the application its further consideration.

[fol. 67] HEALY, Circuit Judge, Dissenting:

The appeal is from an order denying an application for leave to file a habeas corpus petition *in forma pauperis*. Such an application is addressed to the discretion of the trial court, Huffman v. Smith, 9 Cir., 172 F. 2d 129, Tate v. People, 9 Cir., 187 F. 2d 98, and I am unable to see that the court abused its discretion. The petition for the writ presented no question of substance. Most of the points raised had been fully considered by the California court on appeal from the judgment of conviction, People v. Ekberg, 94 C. A. 2d 613, and their lack of merit exposed. In respect of points not urged on the direct appeal there is likewise no substantial showing of the denial of a federal right. I would affirm the judgment.

[fol. 68] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12709

JAMES NELS EKBERG, Appellant,

vs.

RICHARD A. McGEE, et al., Appellees

JUDGMENT—August 31, 1951

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court

with directions to said District Court to give the application its further consideration.

(Endorsed:) Judgment. Filed and entered August 31, 1951, Paul P. O'Brien, Clerk.

[fol. 69] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING AND DENYING MOTIONS—October 25, 1951

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellees, filed October 1, 1951, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

It is further ordered that the petition for a rehearing herein having been denied and the mandate being issuable in due course, the motions filed by appellant on October 17th and 20th, 1951, for immediate issuance of the mandate, etc., be, and hereby are denied.

[fol. 70] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 71] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 10, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

Office - Supreme Court,
FILED
JAN 8 1952
CHARLES ELMORE CROP
CLE

No. 517

RICHARD A. McGEE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, AND ROBERT A. HEINZE, WARDEN, CALIFORNIA STATE PRISON FOR MEN, AT REPRESA, CALIFORNIA,

Petitioners,

vs.

JAMES NELS EKBERG,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDMUND G. BROWN,
Attorney General of the State of California;
CLARENCE A. LINN,
Assistant Attorney General of the State of California;
DORIS H. MAIER,
Deputy Attorney General of the State of California,
112 Library and Courts Building,
Sacramento 14, California,
Attorneys for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 517

RICHARD A. McGEE, Director, California Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California, *Petitioners,*

vs.

JAMES NELS EKBERG,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners herein seek a writ of *certiorari* from this Court to the United States Court of Appeals for the Ninth Circuit.

History of the Ekberg Litigation

The applicant was charged in the Superior Court of the State of California, in and for the County of San Diego, with the crime of issuing a check without funds with intent to defraud. In a separate action he was charged with the crime of possession of a firearm capable of being concealed upon the person by one previously convicted of a felony. He pleaded not guilty and not guilty by reason of insanity in each action. At his request the actions were consolidated for trial and tried together before a jury which found him guilty on both charges, and later the same jury found him sane at the time each of the offenses was committed. The defendant waived application for probation and separate judgments were entered. The applicant was represented by counsel at the time of trial but appealed in *propria persona*. Upon appeal, after a complete review of the record, the judgments of the trial court with respect to each charge were affirmed (*People* v. *Ekberg*, 94 Cal. App. 2d 613, 211 P. 2d 316). A petition for rehearing in the District Court of Appeal of the State of California was filed and denied on November 26, 1949 (*People* v. *Ekberg*, 94 Cal. App. 2d 613, 619, 211 P. 2d 316). Thereafter, applicant's petition for a hearing by the California Supreme Court was denied on December 12, 1949 (*People* v. *Ekberg*, 94 Cal. App. 2d 613, 619, 211 P. 2d 316). No petition for *certiorari* was sought from this Court to review the decision of the District Court of Appeal of the State of California, in and for the Fourth Appellate District (*People* v. *Ekberg*, 94 Cal. App. 2d 613, 619, 211 P. 2d 316), which constituted the final judgment of the highest state court in this matter.

Thereafter the applicant filed a petition for writ of *habeas corpus* with the Supreme Court of the State of California, numbered Crim. 5086, in which he sought to attack the validity of the State court judgment. This was

denied without opinion on March 16, 1950, by the California Supreme Court. A petition for writ of *certiorari* to review this decision was denied by this Court in *Ekberg* v. *California*, 339 U. S. 969, 94 L. Ed. 1377, 70 S. Ct. 988.

The applicant then sought to file this petition for writ of *habeas corpus* on the same grounds as presented to the State court and on which this Court denied *certiorari*, with the Federal District Court from whence these proceedings have arisen.

Statement of the Case

The decision of which review is sought reversed the order of the United States District Court, for the Northern District of California, Northern Division, denying leave to file in *forma pauperis* an application by respondent Ekberg for a writ of *habeas corpus* and ordered the United States District Court for the Northern District of California, Northern Division, to give said application its further consideration (*Ekberg* v. *McGee*, 191 Fed. 2d 625).

The respondent herein transmitted to the Honorable William Denman, Chief Judge of the United States Circuit Court of Appeals of the Ninth Circuit, an application for a writ of *habeas corpus*. Judge Denman, pursuant to Title 28, U. S. C., Sec. 2241(b), transferred said application to the United States District Court for the Northern District of California, Northern Division (Tr. 30-31). The Honorable Dal. M. Lemmon, Judge of said District Court, by an order filed July 31, 1950, denied to respondent the right to file the petition in *forma pauperis* on the ground that:

> "Where a state court has considered and adjudicated the merits of a petitioner's contentions a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. The state of California accords remedies which give due

process of law and there is nothing alleged which presents 'exceptional circumstances of peculiar urgency' which entitle him to the issuance of the writ. Ex parte Hawk, 321 U. S. 114, ex rel. Kennedy v. Tyler, 269 U. S. 13. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered. Huffman v. Smith, 172 F. 2d 129." (Tr. 31)

On August 18, 1950, respondent filed an application for a certificate of probable cause and appealed from the order denying hearing and issuance of writ of *habeas corpus* and the denial of right to file the petition in *forma pauperis* (Tr. 32-33). A certificate of probable cause was issued by the United States District Judge on August 18, 1950 (Tr. 34). Thereafter, on August 24, 1950, a document entitled "Assignment of Errors" was filed by respondent herein in the United States District Court for the Northern District of California, Northern Division (Tr. 35-36) as well as a praecipe for the certified records (Tr. 37-38).

On September 27, 1950, Honorable Dal. M. Lemmon, United States District Judge, ordered that the time for docketing the appeal in the Circuit Court of Appeals for the Ninth Circuit be extended to and including the 27th day of October, 1950 (Tr. 38). Thereafter, and on October 12, 1950, the record in said matter was filed with the United States Circuit Court of Appeals for the Ninth Circuit.

Briefs were filed in said matter and oral argument presented thereafter. On August 31, 1951, the United States Circuit Court of Appeals for the Ninth Circuit issued its opinion, Honorable Circuit Judge Healy dissenting. The opinion reversed the judgment of the District Court and ordered said District Court to give the application for writ of *habeas corpus* further consideration

(*Ekberg* v. *McGee*, 191 F. 2d 625). A timely petition for rehearing was filed in the United States Circuit Court of Appeals for the Ninth Circuit, directing the court's attention to the conflict created by this decision with that in cases previously decided by it upon the same points, the conflict with decisions of other circuit courts of appeal on like points of law and that the interpretation of Sec. 2254 of Title 28, U. S. C., as set forth in this case was not in accordance with the principles of this Court as enunciated in *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, or *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572. This petition for rehearing was denied by the Circuit Court on October 25, 1951 (Tr. 44). Thereafter, and on November 1, 1951, an order staying issuance of mandate was granted by said Circuit Court pending the final consideration and disposition by this Court of a petition for writ of *certiorari* to be presented by petitioners herein.

Statement of Jurisdiction

Jurisdiction to review this cause is rested upon Judicial Code 1948, Title 28 U. S. C., Sec. 1254(1); Title 28, U. S. C., Sec. 2101(c); *Hiatt* v. *Brown*, 338 U. S. 103, 106, 70 S. Ct. 239, 94 L. Ed. 691; Rules of the Supreme Court, Rule 38(5b).

That *habeas corpus* is an action governed by civil rules has been established (*Ex parte Ten Tong*, 108 U. S. 566; 2 S. Ct. 871, 27 L. Ed. 826). The 90-day period within which petitioners may seek *certiorari* from this Court pursuant to the provisions of Sec. 2101(c), Title 28, U. S. C., runs from the date of the denial of the petition for rehearing by the United States Circuit Court of Appeals for the Ninth Circuit, on October 25, 1951 (*Penn. ex rel. Montgomery* v. *Ashe*, 311 U. S. 689, 61 S. Ct. 71, 85 L. Ed. 445).

Question Presented

The question presented by the decision of the United States Circuit Court of Appeals for the Ninth Circuit is whether a federal district court must entertain a petition for a writ of *habeas corpus* by one confined under a final judgment of a state court where the petition on its face alleges that the petitioner has exhausted his state remedies but where it does not show a substantial federal question or exceptional circumstances of peculiar urgency.

Reasons for Allowance of the Writ

The question presented to this Court involves a problem of great public concern and one continuously confronting the federal district courts throughout the nation, as recognized in *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761. These courts have had annually presented to them from five to six hundred *habeas corpus* cases brought by petitioners under State custody. This Court should clarify the principles to be applied by the federal district courts in determining whether an applicant for a writ of *habeas corpus* who is in custody under a state court judgment must present a substantial cause of action for federal relief where he alleges exhaustion of state remedies, or whether, regardless of the merits of such petition, the federal district courts are compelled to entertain further proceedings in the matter even though no circumstances of peculiar urgency are shown on the face of the petition.

In this matter there is now a diversity of opinion among the various circuit courts of the United States. The decision in the Ninth Circuit in the instant case is in direct conflict with the decisions of other circuit courts; namely, *Goodwin* v. *Smyth* (Fourth Circuit), 181 Fed. 2d 498 (cert. denied, 337 U. S. 946, 93 L. Ed. 748, 69 S. Ct. 1503); *Weber* v. *Ragen* (Seventh Circuit), 176 Fed. 2d 579 (cert.

denied, 338 U. S. 809, 94 L. Ed. 489, 70 S. Ct. 49); *Schechtman* v. *Foster* (Second Circuit), 172 Fed. 2d 339 (cert. denied, 339 U. S. 924, 94 L. Ed. 1346, 70 S. Ct. 613); *Coggins* v. *O'Brien* (First Circuit), 188 Fed. 2d 130; *Stonebreaker* v. *Smyth* (Fourth Circuit), 163 Fed. 2d 498; *Edmondson* v. *Wright* (Fourth Circuit), 177 Fed. 2d 719 (cert. denied, 70 S. Ct. 425); *Holliday* v. *State of Maryland* (Fourth Circuit), 177 Fed. 2d 844.

The decision of the Ninth Circuit Court in the instant matter also conflicts with its prior language contained in the cases of *Tate* v. *Heinze* (Ninth Circuit), 187 Fed. 2d 98; *Bird* v. *Smith*, 175 Fed. 2d 260 (cert. denied, 336 U. S. 954, 93 L. Ed. 1109, 69 S. Ct. 876); *Huffman* v. *Smith*, 172 Fed. 2d 129.

The decision of the Ninth Circuit Court in this matter acts to deprive a federal district judge of the discretion vested in him to deny a petition for writ of *habeas corpus* or deny leave to file such petition in *forma pauperis* to the applicant where, on the face of the petition no substantial federal question is presented and also no extraordinary circumstances of peculiar urgency are present, but where the petitioner alleges an exhaustion of state remedies. Although this question was not specifically decided by this Court in the cases of *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, and *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, nevertheless in *Darr* v. *Burford*, 339 U. S. 200, at 214, this Court stated that even after it had declined to review a state judgment denying relief, other federal courts had power to act on a new application by the prisoners but did *not* state that a federal district court *must* entertain such application, but instead used the following language:

> "On that application, the court may require a showing of the record and action on prior application, *and*

> *may decline to examine further into the merits because they have already been decided against the petitioner.* Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds, and repeated adjudications of the same issues by courts of coordinate powers." (339 U. S. 200, at 215). (Emphasis supplied).

In *Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, this Court did not determine the effect the lower federal court should accord a denial of *certiorari* by the Supreme Court where the state prisoner later applied for a federal writ of *habeas corpus* on the same grounds for the reason the point was not there in issue. In the instant case this point is squarely presented.

It is recognized by the Ninth Circuit Court of Appeals in its decision where it is stated:

> "The district court found that the applicant, a prisoner confined on a conviction of felony in the *state court had exhausted his state remedies and that the Supreme Court of the United States denied certiorari to review the action of the Supreme Court of the State of California in denying his petition for habeas corpus.* The brief of appellee admits that the application for the writ in the district court presents no grounds which have not been presented heretofore in the action filed by appellant in the state court, namely, the petition for the writ of habeas corpus to the California Supreme Court." (Emphasis supplied.)

In the light of the fact the Circuit Court in its opinion found that the District Court erred in holding exceptional circumstances must be shown before the federal court or judge could be called upon to exercise the discretion vested in him under Sec. 2254, Title 28, U. S. C., it is apparent that this opinion is not in accord with *Darr* v. *Burford,* 339 U. S. 200, at 214-216, 70 S. Ct. 587, 94 L. Ed. 761, nor is it in accord with the course of action which has hitherto

been recognized as open to federal district judges in the case of *Dorsey* v. *Gill*, 148 Fed. 2d 857.

The rule sought to be adopted by the Ninth Circuit Court does not contribute toward expeditious administration of justice since, on the face of the petition, as found by the district court, no circumstances of peculiar urgency existed. There was nothing pleaded or proved to require prompt federal intervention, and the action of the circuit court in requiring that the district court further consider the matter would place upon district courts a useless and unnecessary burden and an abuse of the writ to secure hearings on frivolous grounds and repeated adjudications of the same issues by courts of coordinate powers.

In light of the fact that the various federal courts of the country are not acting uniformly upon similar problems due to the conflict in decisions of the various circuit courts of the United States, it is respectfully submitted that this Court set forth the standards to be adopted by the district courts for the handling of these hundreds of petitions for *habeas corpus* sought to be filed by inmates of state penal institutions, to the end that the administration of criminal justice may be expedited, and that a full and complete hearing upon a petition for a writ of *habeas corpus* not be needlessly granted in each case by a federal district court regardless of the merit contained in the face of the petition merely because a petitioner alleges an exhaustion of state remedies.

This matter presents a need for the exercise by this Court of its power of supervision over the federal judicial system. The Court's attention is directed to the need for uniformity of action and procedure in this matter of great public interest in a field in which the law is now unsettled.

At the present time, the Federal District Court for the Northern District of California, Southern Division, in following this decision of the Ninth Circuit Court has been

compelled to issue stay orders, entertain petitions for writs of *habeas corpus* and issue orders to show cause in the cases of six prisoners[1] under death sentence in the state courts where the sentences have been affirmed on appeal by the California Supreme Court but where the petitions on their faces do not disclose substantial federal questions necessitating the intervention of a federal court to protect the applicants' constitutional rights.

In order that there may be an end to litigation and the federal courts not be burdened by an avalanche of petitions for writs of *habeas corpus* by prisoners confined under state court judgments who seek to attack these judgments on frivolous grounds, it is respectfully urged that this Court entertain jurisdiction in this matter so that the orderly administration of justice may not be impeded.

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[1] *People v. Wells*, 33 Cal. 2d 330, 202 P. 2d 53; 338 U. S. 836, 94 L. Ed. 510, 70 S. Ct. 43.
In re Wells, 35 Cal. 2d 889, 221 P. 2d 947; 340 U. S. 937, 95 L. Ed. 409, 71 S. Ct. 483.
People v. *Sampsell*, 34 Cal. 2d 757, 214 P. 2d 813; 339 U. S. 990, 94 L. Ed. 1391, 70 S. Ct. 1016.
In re Phyle, 30 Cal. 2d 838, 186 P. 2d 134; 338 U. S. 895, 94 L. Ed. 551, 70 S. Ct. 236.
Phyle v. *Duffy*, 34 Cal. 2d 144, 208 P. 2d 668.
People v. *Kerr, Jr.*, 37 A. C. 13, 229 P. 2d 277.
People v. *Thomas*, 37 A. C. 76, 230 P. 2d 351; 191 Fed. 2d 360.
People v. *Riley*, 35 Cal. 2d 279, 217 P. 2d 625.

Conclusion

For the reasons herein stated, petitioners pray that this Honorable Court issue a writ of *certiorari* to the United States Court for the Ninth Circuit, to the end that the question involved may be fully presented and justice done in the premises.

Dated: Sacramento, California. December, 1951.

Respectfully submitted,

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112 Library and Courts Building, Sacramento 14, California, Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 517

RICHARD A. McGEE, Director, California Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California, *Petitioners,*

v.

JAMES NELS EKBERG,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit which was filed August 31, 1951, a petition for rehearing having been denied by said court on October 25, 1951, is the order sought to be reviewed by *certiorari* and is printed herein in the appendix hereto marked Appendix A, pp. 42-45, *infra* (*Ekberg* v. *McGee,* 191 Fed. 2d 625).

The order of the Honorable Dal M. Lemmon, Judge of the United States District Court for the Northern District of California, Northern Division, denying to the applicant the

right to file a petition for writ of *habeas corpus* in *forma pauperis* is printed in the appendix hereto marked Appendix B, pp. 45-46, *infra*.

As appears from the order of the District Court, the right to file the petition for writ of *habeas corpus* in *forma pauperis* was denied since the petition disclosed that the applicant was confined under a State court judgment; that *habeas corpus* on the same point had been denied by the State Supreme Court and *certiorari* had been denied by the United States Supreme Court; and no "exceptional circumstances of peculiar urgency" were presented which entitled the applicant to the issuance of the writ (Tr. 46).

The reversal of this order and the judgment entered pursuant thereto by the United States Circuit Court of Appeals for the Ninth Circuit was based on the premise that the District Court erred in interpreting the provisions of Sec. 2254, Title 28, U. S. C., and in requiring an applicant to show "exceptional circumstances" where it appeared that the applicant had exhausted the remedies available in the courts of the State. A dissenting opinion by Honorable Circuit Judge Healy was to the effect that the District judge did not abuse his discretion in denying the application for leave to file the *habeas corpus* petition in *forma pauperis* where the petition presented no question of substance, most of the points raised having been fully considered by the California court on appeal from the judgment of conviction in the case of *People* v. *Ekberg*, 94 Cal. App. 2d 613, 211 Pac. 2d 316, and their lack of merit exposed, and in respect to the points not urged on the direct appeal there was no substantial showing of the denial of a federal right (*Ekberg* v. *McGee*, 191 Fed. 2d 625, 627).

In the petition for rehearing filed in the Circuit Court appellees and petitioners herein sought to direct the court's attention to the fact that as a result of the Circuit Court's

decision, the judges of the District Court would be deprived of their right to exercise the discretion vested in them by Sec. 2254, Title 28, U. S. C., in considerations of applications for writs of *habeas corpus* by one confined under a State court process who alleged in his petition "exhaustion of State remedies," but whose petition did not on its face present a substantial federal question nor disclose circumstances of peculiar urgency.

It is apparent that this interpretation of Sec. 2254, Title 28, U. S. C. is not in accord with the intent of the section nor the interpretations hitherto placed thereon by this Court in *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, and *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C., Sec. 1254(1); 28 U. S. C. 2101(c) and Rule 38(2) Rules on Appeal, United States Supreme Court.

Title 28 U. S. C., Sec. 1254(1) provides that cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Title 28 U. S. C., Sec. 2101(c) provides:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days."

That *habeas corpus* is an action governed by civil rules has been established (*Ex parte Ten Tong*, 108 U. S. 556, 2 S. Ct. 871, 27 L. Ed. 826). The ninety-day period within which petitioners could seek *certiorari* from this Court would run from the date of the denial of the petition for rehearing on October 25, 1951, by the United States Circuit Court of Appeals for the Ninth Circuit (*Pennsylvania ex rel. Montgomery* v. *Ashe*, 311 U. S. 689, 61 S. Ct. 71, 85 L. Ed. 445).

The decision of the United States Circuit Court of Appeal for the Ninth Circuit in the instant matter has raised a conflict with decisions of other Circuit Courts of Appeal in the same type of case, namely, the First, Second, Fourth and Seventh Circuits.

At the present time, by virtue of the points left undecided in the cases of *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, and *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, this Court has failed to establish guiding principles to be adopted and applied by the District Courts throughout the nation in their handling of *habeas corpus* cases presented by applicants held under judgments of State courts. Since the Circuit Courts of Appeal have differently interpreted the provisions of Sec. 2254, Title 28 U. S. C., and have drawn different inferences from the opinions of this Court in *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, and *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, there is no uniformity of operation by the District Courts which are faced with the problem in an average of some 600 cases a year filed in these courts.[1] Patently, an exercise of the supervisory power vested in this Court is urgently required to set forth the principles to be followed by the District Courts.

As a result of the decision of the United States Circuit

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[1] *Darr* v. *Burford*, 339 U. S. 200, 233, 70 S. Ct. 587, 94 L. Ed. 761.

Court of Appeals for the Ninth Circuit in this matter, the Federal District Court judges are hesitating to exercise the discretion vested in them to deny these *habeas corpus* petitions where on their face no substantial federal question is presented but where the petition nevertheless alleges a federal question and the State courts and this Court have denied previous petitions for *habeas corpus* and *certiorari*.

The problem here sought to be raised is one currently faced by State officials throughout the forty-eight states and not limited to the circumstances of the case at bar. Its review by this Court is earnestly sought in the interest of establishing a uniform federal procedure to be followed in cases arising from convictions under State laws, which convictions have been duly and regularly upheld by the courts of the State and this Court has denied a review by *certiorari*.

Petitioners submit that the decisions of this Court in *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, and *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, do not compel the conclusion attributed to them by the Circuit Court in the instant decision nor do they support the interpretation placed upon Sec. 2254, Title 28, U. S. C., by said Circuit Court in and for the Ninth Circuit.

Statement of the Case

The respondent herein (applicant) transmitted to the Honorable William Denman, Chief Judge of the United States Circuit Court of Appeals for the Ninth Circuit, an application for a writ of *habeas corpus*. Judge Denman, pursuant to the provisions of Title 28 U. S. C., Sec. 2241(b), transferred said application to the United States District Court for the Northern District of California (Tr. 30). The Honorable Dal M. Lemmon, Judge of said Court, by an order filed July 31, 1950, denied to respondent herein the

right to file the petition for *habeas corpus* in *forma pauperis* on the ground that there was nothing alleged therein which presented "exceptional circumstances of peculiar urgency" which entitled him to the issuance of the writ even though he had alleged exhaustion of State remedies (Tr. 30-31).

On August 18, 1950, applicant filed a request for a certificate of probable cause and appeal from the order denying a hearing and issuance of a writ of *habeas corpus* and the denial of the right to file *in forma pauperis* (Tr. 32-33). This certificate was granted (Tr. 34). On August 24, 1950, said applicant filed a document entitled "Assignment of Errors" as well as a praecipe for the certified records (Tr. 35-36). On October 12, 1950, the record was filed in the above matter with the Circuit Court. Thereafter within rule time briefs were filed, counsel having been appointed to represent the applicant. On August 31, 1951, the Circuit Court issued its decision reversing the judgment of the District Court and ordering said Court to give the matter its further consideration (Tr. 40-44). A petition for rehearing in said matter was filed within rule time and on October 25, 1951, this petition for rehearing was denied (Tr. 44). On November 1, 1951, a stay of mandate was granted by the United States Circuit Court of Appeals for the Ninth Circuit to enable petitioners herein to seek *certiorari* from this Court by December 17, 1951.

An examination of the petition for *habeas corpus* sought to be filed by the applicant discloses that he was convicted in the State court on two charges, one issuing a check without funds with intent to defraud, and second, possession of a firearm capable of being concealed upon the person by one previously convicted of a felony. The applicant was represented by counsel in the State trial court, but on appeal from the judgment of conviction, appeared in *propria persona* (94 Cal. App. 2d 613, 211 P. 2d 316). The

judgments against him were affirmed by the Fourth District Court of Appeal of the State of California in the case of *People* v. *Ekberg*, reported at 94 Cal. App. 2d 613, 211 P. 2d 316. A petition for rehearing was denied by said Fourth District Court of Appeal on November 26, 1949, and a petition for hearing by the California Supreme Court was denied on December 12, 1949 (*People* v. *Ekberg*, 94 Cal. App. 2d 613, 619, 211 P. 2d 316). No petition for writ of *certiorari* was sought to review this decision of the District Court of Appeal of the State of California, in and for the Fourth Appellate District, which was the final judgment of the highest court of the State of California. He thereafter filed a petition for writ of *habeas corpus* in the California Supreme Court No. 5086, which was denied without opinion by said Court on March 16, 1950. An application to this Court for a writ of *certiorari* was denied without opinion on May 29, 1950 (*Ekberg* v. *California*, 339 U. S. 969, 94 L. Ed. 1377, 70 S. Ct. 986). Applicant then sought to file the writ in question herein based on the same grounds in the Federal District Court (Tr. 1-20).

In his petition for writ of *habeas corpus*, the applicant attacked the State judgments under which he was confined on the following grounds: (1) that the trial court lacked jurisdiction and that the convictions were not valid; (2) that there was insufficient evidence to justify his conviction of issuing a check without sufficient funds pursuant to Sec. 476a [2] of the Penal Code of the State of California and insufficient evidence before the magistrate to justify his having been held for trial; (3) that the joinder of the two separate informations for trial resulted in a denial to him of due process of law; (4) that he was deprived of counsel of his own choice and his counsel was grossly incompetent; (5) that certain defense witnesses demanded by him were

[2] Appendix C, Sec. 476a, Penal Code, State of California.

not subpoenaed, although he had so requested his counsel, which resulted in a lack of due process of law; (6) that he was twice placed in jeopardy for the same offense by reason of the joinder of offenses for trial and the fact that the sentences were ordered to run consecutively; (7) that he was denied an opportunity to appear and personally argue his cause in the District Court of Appeal of the State of California, in and for the Fourth Appellate District, or to have counsel appointed to represent him on his appeal which resulted in a lack of due process of law as to him (Tr. 1-20).

That these contentions were without merit and were fully answered by the decision of the State court appears from the case of *People* v. *Ekberg*, 94 Cal. App. 2d 613, 211 P. 2d 316, of which the Federal District Court could take judicial notice (*U. S. ex rel. Wing* v. *Com.* (D. C. Pa. 1950), 90 Fed. Supp. 208; *Knight* v. *People*, 60 Fed. Supp. 164). It thus clearly appears as recognized by Circuit Judge Healy in his dissenting opinion in *Ekberg* v. *McGee*, 191 Fed. 2d 625, 627:

"The petition for the writ presented no question of substance. Most of the points raised had been fully considered by the California court on appeal from the judgment of conviction, People v. Ekberg, 94 Cal. App. 2d 613, and their lack of merit exposed. In respect of points not urged on the direct appeal there is likewise no substantial showing of the denial of a federal right."

Specifications of Error Urged Herein

The United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the judgment of the Federal District Court for the Northern District of California, Northern Division, on the following grounds:

(1) Where the petition on its face did not present a substantial federal question even though the applicant held under a State court judgment alleged exhaustion of State remedies, the federal district court did not err in denying the applicant the right to file the petition in *forma pauperis*.

(2) The decision of the Ninth Circuit Court in restricting the discretion vested in the judges of the Federal District Court to deny leave to file a petition for writ of *habeas corpus* in *forma pauperis* without further proceedings is in direct conflict with the decisions of other Circuit Courts of the United States, namely, the First, Second, Fourth, and Seventh Circuits on similar points.

(3) The decision of the Ninth Circuit Court is not in accord with the principles set forth by this Court in *Darr* v. *Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, and *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, upon which reliance is placed, nor does it correctly interpret the provisions of Sec. 2254, Title 28 U. S. C.

(4) The decision of the Circuit Court imposes upon Federal District Courts and State officials an unnecessary and serious burden of appearing and opposing petitions for writs of *habeas corpus* in Federal District courts by applicants attacking a final State court judgment even though the face of the petition does not establish a substantial cause of action for federal relief but does show an exhaustion of State remedies.

(5) The decision does not give to the denial of a writ of *certiorari* by this Court from a decision of the highest State court any weight when a new petition raising the same points is later presented to a Federal District Court, but holds that the Federal District Court must entertain jurisdiction and hear the matter.

Summary of Argument

I. THE UNITED STATES DISTRICT COURT DID NOT ERR IN DENYING LEAVE TO FILE A PETITION FOR WRIT OF *HABEAS CORPUS* IN *FORMA PAUPERIS* WHERE THE PETITION ON ITS FACE DID NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND NO "EXTRAORDINARY CIRCUMSTANCES OF PECULIAR URGENCY" WERE DISCLOSED. THE ACTION OF THE NINTH CIRCUIT COURT IN REVERSING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT WAS ERRONEOUS.

II. THE DECISION OF THE NINTH CIRCUIT COURT IS IN CONFLICT WITH DECISIONS RENDERED BY OTHER CIRCUIT COURTS OF THE UNITED STATES, NAMELY, THE FIRST, SECOND, FOURTH, AND SEVENTH CIRCUITS, ON THE SAME POINTS OF LAW.

III. THE DECISION OF THE NINTH CIRCUIT COURT IS NOT IN ACCORD WITH THE PRINCIPLES SET FORTH IN *DARR* V. *BURFORD*, 339 U. S. 200, 70 S. CT. 587, 94 L. ED. 761, AND *EX PARTE HAWK*, 321 U. S. 114, 64 S. CT. 448, 88 L. ED. 572.

IV. THE DECISION OF THE NINTH CIRCUIT COURT IMPOSES AN UNNECESSARY BURDEN ON THE FEDERAL DISTRICT COURTS AND IMPEDES THE ORDERLY ADMINISTRATION OF JUSTICE.

V. THE NINTH CIRCUIT COURT BY ITS DECISION HAS REFUSED TO GIVE ANY WEIGHT TO THE DENIAL OF *CERTIORARI* BY THIS COURT OF THE HIGHEST STATE COURT'S DECISION IN THE SAME MATTER.

ARGUMENT

I. The United States District Court Did Not Err in Denying Leave to File a Petition for Writ of Habeas Corpus in Forma Pauperis Where the Petition on its Face Did Not Present a Substantial Federal Question and no "Extraordinary Circumstances of Peculiar Urgency" Were Disclosed. The Action of the Ninth Circuit Court in Reversing the Judgment of the United States District Court was Erroneous.

In the case of *Dorsey* v. *Gill*, 148 Fed. 2d 857 (cert. denied, 325 U. S. 890, 89 L. Ed. 2003), the United States Court of Appeals for the District of Columbia, examined at great

length the office and nature of the writ of *habeas corpus* and the procedure to be followed in federal courts upon an application therefor. The opinion, which is exhaustively annotated, summarized the procedure which may be followed by a district court on a petition for the issuance of a writ of *habeas corpus* and stated (pp. 865-866):

> "There are at least ten such possible alternatives, as follows: (1) When a petition is presented to a judge with request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; or (2) he may in the interest of justice—if the petition is insufficient in substance — require petitioner to amend it; or he may require him to show—if the judge is not otherwise informed — whether petitioner has made a prior application and, if so, what action was had on it; (3) he may issue a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted and upon the return, may grant or deny leave to file; (4) after a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith; (5) if, upon a consideration of a petition which has been filed, it appears the petitioner is not entitled to the writ, the court should refuse to issue it; (6) if the allegations of the petition are inconclusive, the judge may issue a rule to show cause why a writ should not be granted to which the relator may respond; (7) if the procedure suggested in (6) is followed, the facts on which the opposing parties rely having been exhibited to the judge, he may find that no issue of fact or law is involved and may then refuse to grant the writ, in which event it is not necessary to hold a hearing; (8) on the other hand, if the procedure suggested in (6) is followed, the judge may find that the facts admitted—in response to the order to show cause—entitled the petitioner to the writ and to a discharge, forthwith, as a matter of law; or (9) he may find that an issue is involved; in which event he should grant the writ and require a hearing, the petition and traverse being then treated as, to-

gether, constituting the application for the writ, the return to the rule as setting up the facts thought to warrant its denial, and the issues of fact, thus emerging, should be tried as required by that statute; (10) if, as a matter of convenience, the judge—without determining whether the petition is sufficient—issues the writ he may then, upon the return, hear and dispose of the whole matter at once."

The District Court in the instant proceeding followed the alternative set forth in (1) of *Dorsey* v. *Gill*, 148 Fed. 2d 857. In denying leave to the applicant to file the petition for *habeas corpus*, the District Court found that the applicant had exhausted his State remedies, that the questions presented had been ruled upon by the State courts and *certiorari* denied by this Court and that no "extraordinary circumstances were presented of peculiar urgency" justifying the intervention of a federal district court.

The allegation of the petition for writ of *habeas corpus*, namely, that the trial court had no jurisdiction because the allegation of the information as to applicant's prior conviction was not sustained, was fully considered and rejected by the District Court of Appeal of the State of California, in and for the Fourth Appellate District, in *People* v. *Ekberg*, 94 Cal. App. 2d 613, 617-618, 211 P. 2d 316, wherein it was stated:

"The information charged that the appellant had previously, on April 24, 1942, been convicted of a felony, 'Impersonation of a U. S. Officer,' with imprisonment under certain numbers in Leavenworth and Atlanta prisons, and that this judgment had never been reversed or set aside. It is now contended that this charge was not sustained, and that the charge of a former conviction is 'illegal and void' since it developed at the trial that this former judgment had actually been reversed in the case of *Ekberg* v. *United States*, 167 F. 2d 380. When the district attorney attempted to intro-

duce evidence that the appellant had been previously convicted as alleged in the information appellant's counsel stipulated that he was so convicted, and the appellant personally joined in this admission. It was then stipulated that the appellant was, on April 24, 1942, in the United States District Court at Puerto Rico, convicted of the crime of felony, to wit, impersonation of a United States officer; that judgment was pronounced on that date; that the appellant served a term of imprisonment in the United States penitentiary at Leavenworth and at Atlanta; and 'that said judgment has never since been reversed, annulled or set aside.' An objection to the introduction of evidence to establish these facts was then made on the ground that the facts had already been established, and was sustained. At the close of the appellant's evidence, he himself tried to raise the contention that the case above cited had reversed his conviction. His counsel assured the judge that he had read this case, that there was only a partial reversal for an error in giving consecutive sentences under different counts, that there was nothing at all wrong with one sentence, and that what happened in connection with that reversal had 'not a thing' to do with the issue presented in this case. There is nothing in the case cited which would have the effect here contended for, and the defendant is bound by the stipulations and admissions which were made. It is further contended, in this connection, that the jury should have been advised that the defendant had served an extra period of imprisonment and probation under that former conviction, as was developed after a part of the judgment was reversed. This was not material to any issue here and no error appears in that connection."

As to the applicant's second point that the information failed to charge an offense under Sec. 476a of the California Penal Code, that the evidence was insufficient to support the verdict and that he was held to answer by the committing magistrate without reasonable or probable cause, these

points were fully covered by the District Court of Appeal of the State of California, in and for the Fourth Appellate District, in its decision in *People* v. *Ekberg*, 94 Cal. App. 2d 613, 615-616.

Moreover, it has long been settled that the writ of *habeas corpus* cannot be used for the purpose of proceedings in error and that the sufficiency of the evidence to support the conviction may not be inquired into under the writ.

Burall v. *Johnson*, 134 Fed. 2d 614 (cert. den. 63 S. Ct. 1327, 319 U.S. 768), Rehearing den. 64 S. Ct. 187, 320 U.S. 812;

Sunal v. *Large*, 332 U.S. 174, 67 S. Ct. 1588;

Frank v. *Mangum*, 237 U.S. 309, 35 S. Ct. 582.

With relation to the applicant's contention that he was deprived of counsel of his own choice or that his counsel was incompetent, it is apparent that this point could have and should have been raised on appeal from the original judgment. No facts are set forth which would tend to disclose the truth of this allegation or show that at any time the applicant raised this matter in his original proceedings in the State courts, and therefore it would not be cognizable by the federal courts under the rule of exhaustion of State remedies (*Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L.Ed. 761).

The applicant's contention that he was denied the presence of defense witnesses because of the incompetency of his counsel does not constitute a denial of due process of law and the competency or incompetency of counsel was a question of fact to be passed upon by the courts of the State, which found applicant had a fair trial, and this does not present a substantial federal question, for unless the representation amounted to no representation at all, there is no lack of due process (*Moore* v. *Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543).

With relation to the applicant's further contention that he was twice in jeopardy for the same offense in that the court ordered consolidated for trial the information for violation of California Penal Code, Sec. 476a, and the information alleging possession of a firearm capable of being concealed upon the person of one previously convicted of a felony, the record discloses that this consolidation was made at the request of the applicant and he may not attack such joinder on *habeas corpus* (*People* v. *Ekberg*, 94 Cal. App. 2d 613, 211 P.2d 316). Moreover, the question of joinder is regulated by the law of the State and the Fourteenth Amendment does not control mere forms of procedure in the State courts or regulate the practice therein.

Holden v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383;
Hurtado v. *State of Cal.*, 110 U. S. 516, 4 S. Ct. 111;
People v. *Burton*, 91 Cal. App. 2d 695, 205 P. 2d 1065 (cert. den. 338 U. S. 886);
Bundte & Phillips v. *People of the State of Calif.*, 87 Cal. App. 2d 735, 197 P. 2d 823 (cert. den. 337 U. S. 915).

As to the applicant's contention that he was not afforded a probation hearing and that judgment and sentence were improperly imposed, this point is covered in the decision of the District Court of Appeal of the State of California in *People* v. *Ekberg*, 94 Cal. App. 2d 613, 618-619, and does not present a substantial federal question (*Williams* v. *N. Y.*, 337 U. S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079).

Appplicant's contention that he was not afforded a proper appeal in that his request to be personally present and argue the matter in the State District Court of Appeal was denied, as was his request for the appointment of counsel to argue said matter, is also without merit. The assistance of counsel on appeal or the right of an appellant to be per-

sonally present and argue the matter is a question within the discretion of the appellate court and an appellant as a matter of right is not entitled to be produced. The refusal of this right does not involve a lack of due process of law or present a substantial federal question (*Price* v. *Johnson*, 334 U. S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356).

Thus it appears that the decision of the Ninth Circuit Court in ordering that the judgment and order of the District Court be reversed was not in accord with the principles of law hereto set forth by this Court as the petition on its face demonstrated a lack of a substantial federal question or circumstances of peculiar urgency which would warrant the intervention of a federal district court after a decision by the highest State court in the matter, the denial of writs of *habeas corpus* on the same matter by the State courts, and denial by this Court of *certiorari* to review said matter.

II. The Decision of the Ninth Circuit Court is in Conflict With Decisions Rendered by Other Circuit Courts of the United States, Namely, the First, Second, Fourth, and Seventh Circuits, on the Same Points of Law.

In the case of *Coggins* v. *O'Brien*, 188 Fed. 2d 130, decided by the United States Court of Appeals, First Circuit, the action of the United States District Court dismissing an application for *habeas corpus* and denying the writ was affirmed. In the cited case, the petitioner had been tried and convicted in the state courts for second degree murder. He did not appeal his conviction, but made a motion for a new trial, which was denied. On appeal from the order denying the motion for a new trial, this order was affirmed by the State Supreme Court, and *certiorari* denied by the United States Supreme Court. Thereupon, petitioner sought *habeas corpus* from the federal district court, which was denied, and this order affirmed on appeal. The court stated (p. 133):

"While state courts have full discretionary power either to hear again or summarily to dispose of repeated applications for habeas corpus grounded on the same facts filed by prisoners in state custody, and federal courts have like powers with respect to prisoners in federal custody, different considerations apply in cases like the present. Due respect for the delicacies of the relationship between the United States and its courts, and the states and theirs, under a federal system such as ours (see *Darr* v. *Burford*, 339 U.S. 200, 205 et seq., 70 S. Ct. 587, 94 L. Ed. 761, and cases cited) requires that the federal courts withhold their relief in state custody cases until it is made to appear that the state has not afforded a constitutionally adequate opportunity to prove the factual basis for a constitutional contention such as this unless 'exceptional circumstances of peculiar urgency are shown to exist'. *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17, 46 S. Ct. 1, 3, 70 L. Ed. 138; *Ex parte Hawk*, 321 U.S. 114, 64 S. Ct. 448, 88 L. Ed. 572. In my view the area of judicial discretion in cases like the present is limited to the evaluation of the urgency of any exceptional circumstances which may be present in a particular case." In the case of *Goodwin* v. *Smyth* (4 Circ.) 181 Fed. 2d 498 (cert. den. 337 U.S. 946, 69 S. Ct. 1503, 93 L. Ed. 1748) after petitioner had exhausted his state remedies and applied for *habeas corpus* on the same ground in the United States District Court, the petition was denied and this denial was affirmed on appeal. The court, in basing its decision on *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, stated (p. 498):

"It is clear that the petition was properly denied. There was no allegation of any such unusual circumstances as would justify a lower federal court in granting a writ of habeas corpus to release a state prisoner, when that relief had been denied by the highest court of the state and the Supreme Court had refused certiorari. As said by that court in *White* v. *Regan*, 324 U.S. 760, 764, 65 S. Ct. 978, 981, 89 L. Ed. 1348: 'If this

Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk*, supra, 321 U.S. (114) 118, 64 S. Ct. (448) 450, 88 L. Ed. 572'.

"See also *Stonebreaker* v. *Smyth*, 4 Cir. 163 F. 2d 498; *House* v. *Mayo*, 324 U.S. 42, 65 S. Ct. 517, 89 L. Ed. 739; *Darr* v. *Burford*, 1950, 70 S. Ct. 587, 596. In the case last cited, the Supreme Court said: 'Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner. On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner. Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds and repeated adjudications of the same issues by courts of coordinate powers.'"

In the case of *Adkins* v. *Smith* (4 Circ.) 188 Fed. 2d 452, in affirming an appeal from an order denying a writ of *habeas corpus* on the ground that the bill of indictment was fatally defective, the circuit court stated (p. 453):

" 'We are confronted at the outset with the fact that the case presented by the petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and peti-

tioner would have been afforded relief. While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts had refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of *White* v. *Ragen*, 324 U.S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L. Ed. 1348, relied on by the court below, as follows:

" 'If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk*, supra, 321 U.S. (114) 118, (64 S. Ct. 448, 88 L. Ed. 572).'

" 'The citation of *Ex parte Hawk* shows what the court had in mind in the use of the words "will not usually re-examine" in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy afforded proved in practice unavailable or seriously inadequate.' "

Again, in the case of *Schechtman* v. *Foster* (Second Circuit), 172 Fed. 2d 339 (cert. denied, 339 U.S. 924, 70 S. Ct.

613, 94 L. Ed. 1346), defendant appealed from an order of the federal district court dismissing his petition for a writ of *habeas corpus* after conviction of robbery in the state courts of New York. His petition was based on the ground that perjured testimony was used knowingly by the prosecution. His original conviction had been affirmed without opinion by the Appellate Division of the New York courts. Leave to appeal was denied. He had also sought petitions for *habeas corpus, mandamus, certiorari,* and *coram nobis* in the state courts, *certiorari* to the United States Supreme Court having been denied on the last *coram nobis* proceeding. In affirming the denial of the writ of *habeas corpus* by the federal district court, the Second Circuit Court stated (p. 341):

> "It must be remembered that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judges' conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights."

In *Weber* v. *Ragen* (7 Cir.) 176 Fed. 2d 579 (cert. den. 70 S. Ct. 49, 338 U.S. 809, 94 L. Ed. 489), the Seventh Circuit Court in affirming the denial of a writ of *habeas corpus* by the district court stated (p. 582):

> "In the instant case certiorari from the Supreme Court of the United States to the Supreme Court of Illinois was sought and denied. The violations of all constitutional rights alleged here to have occurred were alleged on certiorari and urged to the Supreme

> Court of the United States. The Supreme Court was obviously not impressed with the petitioner's assertion that he had been deprived by the courts of Illinois of his constitutional rights. We have been cited no case where the Supreme Court had denied certiorari, as in this case, and later decided that the United States District Court should take jurisdiction in a collateral proceeding in habeas corpus to consider the identical questions that had been presented in the direct proceeding where certiorari was denied. * * * There are no extraordinary circumstances in this case that would take it out of the rule just stated."

The same principles have been applied in the cases of *Goodman* v. *Swenson* (4 Cir.) 173 Fed. 2d 349, *Edmondson* v. *Wright* (4 Cir.) 177 Fed. 2d 719 (cert. den. 71 S. Ct. 425), *Holliday* v. *State of Maryland* (4 Cir.) 177 Fed. 2d 844; *United States* v. *Foster* (2 Cir.), 175 Fed. 2d 495; *Holderfield* v. *Ragen* (7 Cir.) 170 Fed. 2d 189.

It thus appears that the decision of the Ninth Circuit Court in the instant matter raises a direct conflict with the decisions of other circuit courts of the United States which recognize that "exceptional circumstances of peculiar urgency" and a substantial federal question must be presented to a federal district court by an applicant who has exhausted his state remedies before the court must entertain such petition.

III. The Decision of the Ninth Circuit Court is Not in Accord With the Principles Set Forth in Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed 761, and Ex Parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572.

In its decision the Ninth Circuit Court has interpreted Section 2254, Title 28, U.S.C., which reads, in part:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment

> of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, *or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*" (Emphasis supplied.)

so that the italicized alternatives after the word "or" have no application, where as here, there is an effective state remedy of which the applicant has availed himself. This decision of the Circuit Court holds that the statement of this Court in *Ex parte Hawk*, 321 U.S. 114, 64 S. Ct. 448, 88 L. Ed. 572, that the writ is available in the federal courts only in "rare cases" presenting "exceptional circumstances of peculiar urgency" was not applicable to a case in which the petitioner has exhausted his state remedies.

This Court in neither *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, or *Ex parte Hawk*, 321 U.S. 114, 64 S. Ct. 448, 88 L. Ed. 572, set forth the principle that after exhaustion of state remedies by a petitioner seeking a writ from the federal district court to review the validity of his custody under a state judgment, a federal district court *must* entertain such petition. Under the majority opinion of this Court in the *Darr* case, the federal district judge has the discretion to review such petition and dismiss it where on its face no substantial federal question is presented and no extraordinary circumstances of peculiar urgency are disclosed. (*United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17, 46 S. Ct. 1, 3, 70 L. Ed. 138).

The applicant in the federal district court in this matter did not bear his burden of proof in showing on the face of his petition that the state court remedies did not afford him a full and fair adjudication of his rights or that the remedies afforded by California law proved in practice unavailable or seriously inadequate.

In *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, this Court stated:

> "It is this Court which ordinarily should reverse state court judgments concerning local criminal administration." * * * and again, on page 217:
>
> "It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court."

In interpreting this language, Circuit Judge Woodbury, in *Coggins* v. *O'Brien*, 188 Fed. 2d 130, 134, stated:

> "If the language quoted above is to be taken literally and given general application, then it would appear that even though a prior denial of certiorari to the highest state court is of no moment, it is not our function, except in extraordinary cases, to disagree with that court's determination that the local system for the administration of justice squares with federal constitutional requirements. Hence, if it is not for us to disagree with the highest state court, it would seem that the function of the inferior federal courts in these cases would be only to expedite the applicant for habeas corpus along his secondary road through the federal courts to a second petition to the Supreme Court for certiorari to review the federal question which it has once declined to consider. And, on the other hand, if the denial of certiorari to the highest state court is to be given any weight at all by the inferior federal courts in cases like the present, it would seem to follow that we ought also to expedite the applicant on his way for, as pointed out by Judge Learned Hand in the Schechtman case, supra, 172 F. 2d 343 'unless we are altogether to disregard the action of the court of last resort in the very case itself, the denial ought to be conclusive.' "

Thus it would appear that the Ninth Circuit Court in its decision in the instant matter has attempted to unwarrantedly restrict the discretion vested in the Federal District Court by relying upon an erroneous interpretation of the language of this Court in *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, and *Ex parte Hawk*, 321 U.S. 114, 64 S. Ct. 448, 88 L. Ed. 572, and adopted a construction at variance with that adopted by other circuit courts.

IV. The Decision of the Ninth Circuit Court Imposed an Unnecessary Burden on the Federal District Courts and Impedes the Orderly Administration of Justice.

By the action of the Ninth Circuit Court, the federal district courts are compelled to entertain petitions for writs of *habeas corpus* sought to be filed *in forma pauperis* where the applicant has exhausted his state remedy even though no substantial federal question is apparent on the face of the petition and no circumstances of peculiar urgency are presented.

This is recognized by the dissenting opinion of Circuit Judge Healy, which states:

> "The petition for the writ presented no question of substance. Most of the points raised had been fully considered by the California court on appeal from the judgment of conviction, People v. Ekberg, 94 Cal. App. 2d 613, and their lack of merit exposed. In respect of points not urged on the direct appeal there is likewise no substantial showing of the denial of a federal right."

With hundreds of petitions for writs of habeas corpus being presented to federal district courts by prisoners held in state custody who are now familiar with the doctrine of "exhausting state remedies" both the state officials and the federal district courts will be hopelessly burdened by the requirement of a full hearing in each such case, regardless of whether circumstances of peculiar urgency are

shown. This does not effect the "orderly administration of justice" sought to be achieved by this Court in its decision in *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, or *Ex parte Hawk*, 321 U.S. 114, 64 S. Ct. 448, 88 L. Ed. 572.

There is no question but that the State of California affords an available corrective process in its courts (*Adamson* v. *State of California*, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A.L.R. 1223; *Mooney* v. *Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791). It must be presumed that this Court in denying *certiorari* from a state court judgment would not fail to recognize an applicant's deprival of his constitutional rights, if such omission did occur in the state courts. However, following the logic of the decision of the Ninth Circuit Court in this matter, the failure of the state courts to grant a writ of *habeas corpus* or this Court to grant *certiorari* would compel the federal district court to entertain jurisdiction where the applicant had sought in vain for relief in the state courts, even though the face of the petition did not justify such relief. The Supreme Court of the State of California in the case of *In re Swain*, 34 Cal. 2d 300, 209 P. 2d 793, in denying a petition for writ of *habeas corpus* to secure the release of a prisoner from custody, stated:

> "We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation."

The decision in the Ninth Circuit Court of Appeals would not accord to the statement of principle set forth in the case of *In re Swain*, 34 Cal. 2d 300, 209 Pac. 2d 793, the weight to which it should be accorded by federal courts. Thus, where, as here, an applicant did *not* set forth primary facts to show that the State departed from constitutional requirements so as to justify a federal court's intervention, nevertheless it would require such intervention merely because state remedies had been exhausted.

The result of the decision in this matter poses a problem of great concern to both the federal courts throughout the nation and the state officials who must appear in answer to rules to show cause and the issuance of writs of *habeas corpus* involving the custody of applicants in state prisons. To place this additional burden upon both the federal district courts and the state officials in cases where on the face of the record no substantial federal question is involved merely impedes the administration of justice and does not accord to state judicial proceedings the presumption of constitutional regularity which this Court has held them to have in *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761.

V. The Ninth Circuit Court of Appeal by Its Decision has Refused to Give Any Weight to the Denial of Certiorari by this Court of the Highest State Court's Decision in the Same Matter.

As appears from the decision of the Ninth Circuit Court, the applicant has presented the same points to the state courts and to this Court on a petition for *certiorari* as he sought to present to the federal district court which denied his leave to file the application in *forma pauperis*. While it has been stated that the denial of a petition for *certiorari* by this Court is not binding on the principle of *res judicata*,

nevertheless such prior denial should carry considerable weight in disposing of a later application in order to safeguard against abuse of the writ (*Salinger* v. *Loisel*, 265 U.S. 224, 232).

This Court in *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, specifically avoided an answer to the question presented as the issue was not before the court in that case. Here the issue is squarely presented. The state of uncertainty in which District Courts are left by the decision of this Court in *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, has led to conflicting interpretations as to the meaning to be given a denial of *certiorari* by this Court on the same points later presented to the federal district court by an applicant confined under state judgments. As has been recognized by this Court, it is one of its functions to resolve conflicts among the lower courts. The reserving of the question in *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, has led to the conflict of decisions on this point among the various circuit courts of the United States. The result of the decision in the instant matter means a multiplying of the steps in a legal process without in any manner expediting the result to be achieved and confers upon the federal district court the right and duty to entertain petitions for writs of *habeas corpus* even though substantial federal rights are not found to be in issue in state courts, and such action not reviewed by this Court.

If review upon *certiorari* by this Court is to be considered an integral part of the state procedure for exhaustion of state remedies, then some weight should be given to the fact this Court has not granted *certiorari* to review the state court's judgment, which is presumed to have accorded an applicant his constitutional rights. As stated in *Adkins* v. *Smith*, 188 Fed. 2d 452, 453, "It would be intolerable that

a federal district court should release a prisoner on *habeas corpus* after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on *certiorari*. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state." It is therefore of urgent necessity that this Court clarify its statements in *Darr* v. *Burford*, 339 U.S. 200, 70 S. Ct. 587, 94 L. Ed. 761, as to the weight to be given the denial of *certiorari* by this Court upon a later application for *habeas corpus* in federal district courts by state prisoners upon the same or similar grounds.

Conclusion

Petitioners urge that this Court grant *certiorari* in this matter to review the decision of the Ninth Circuit Court of Appeals in order that the conflicts among the Circuit Courts be resolved; that this Court under its supervisory power over District Courts should set forth the criteria to be applied in determining the jurisdiction to be exercised by those courts over petitions for writ of *habeas corpus* presented by state prisoners after state remedies have been exhausted; and that this Court consider this problem in order that a question of great public concern may be settled by the authority of the highest court of the United States and the orderly administration of justice throughout the nation may be expedited.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES NELS EKBERG, *Appellant*,

vs.

RICHARD A. McGEE, Director, California Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California, *Appellees*

No. 12,709—Aug. 31, 1951

On Appeal from the United States District Court for the Northern District of California, Northern Division

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Before: DENMAN, Chief Judge, and HEALY and ORR, Circuit Judges.

DENMAN, Chief Judge:

This is an appeal from an order of the district court refusing to allow appellant Ekberg to file, in forma pauperis, an application for a writ of habeas corpus. The district court found that the applicant, a prisoner confined on a conviction of felony in the state courts of California, had exhausted his state remedies and that the Supreme Court of the United States denied certiorari to review the action of the Supreme Court of the State of California in denying his petition for habeas corpus. The brief of the appellee admits that the application for the writ in the district court presents no grounds which have not been presented heretofore in the action filed by appellant in the state court, namely, the petition for the writ of habeas corpus to the California Supreme Court.

The ground of the district court's decision is that, although the appellant had exhausted the state remedy in habeas corpus, he must nevertheless show exceptional circumstances to warrant the exercise of his discretion to refuse to allow the filing of his application for the writ "if it

appears that the applicant has no cause of action." Huffman v. Smith, 172 F. 2d 129, 130 (Cir. 9). Where an examination of the state record shows a cause of action, the Supreme Court, in Hawk v. Olson, 326 U.S. 321, 326, requires its consideration in either the following situations:

> "When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. White v. Ragen, 324 U.S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. Williams v. Kaiser, 323 U.S. 471; Tomkins v. Missouri, supra [323 U.S. 485]."

The district court declined so "to review the state proceedings," giving as its reasons: "Where a state court has considered and adjudicated the merits of a petitioner's contentions a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. The State of California accords remedies which give due process of law and there is nothing alleged which presents 'exceptional circumstances of peculiar urgency' which entitled him to the issuance of the writ. Ex parte Hawk, 321 U.S. 114; ex rel Kennedy v. Tyler, 269 U.S. 13. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered. Huffman v. Smith, 172 F. 2d 129."

We think the district court erred in holding exceptional circumstances must be shown before the federal court or judge may be called upon to exercise the discretion described in Huffman v. Smith, supra, 230. The applicable statute is 28 U.S.C. § 2254, providing:

> "§ 2254. State custody; remedies in State Courts
>
> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in

the courts of the State, *or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available process, the question presented." (Emphasis supplied.)

The italicized alternatives after the word "or" have no application where, as here, there is an effective state remedy of which the applicant has availed himself. This construction of § 2254 is in accord with the prior holding in Ex parte Hawk, supra:

"The statement that the writ is available in the federal courts only 'in rare cases' presenting 'exceptional circumstances or peculiar urgency,' often quoted from the opinion of this Court in United States ex rel. Kennedy v. Tyler, supra, 17, was made in the case in which the petitioner had not exhausted his state remedies and *is inapplicable* to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right." (Emphasis supplied.)

It is so recognized in Darr v. Burford, 399 U. S. 200, 211.

The appellee also contends that appellant has not exhausted his state remedies because under the California law a decision on a petition for the writ of habeas corpus is not res judicata. Hence, the argument is, he has still an "available process" in a second petition for the writ setting forth the same grounds as in the prior writ.

Assuming but not deciding that such is the California law, we do not so construe the provisions of § 2254, for to do so would require the absurdity that a prisoner convicted under the California law never could have the benefit of that section. That section is satisfied where the applicant for the writ has once availed himself of his state remedies.

Since the district court's only ground for the refusal to

exercise the discretion above described is the absence of special circumstances, the judgment is reversed and the court ordered to give the application its further consideration.

HEALY, *Circuit Judge, Dissenting:*

The appeal is from an order denying an application for leave to file a habeas corpus petition *in forma pauperis*. Such an application is addressed to the discretion of the trial court, Huffman v. Smith, 9 Cir., 172 F. 2d 129, Tate v. People, 9 Cir., 187 F. 2d 98, and I am unable to see that the court abused its discretion. The petition for the writ presented no question of substance. Most of the points raised had been fully considered by the California court on appeal from the judgment of conviction, People v. Ekberg, 94 C. A. 2d 613, and their lack of merit exposed. In respect of points not urged on the direct appeal there is likewise no substantial showing of the denial of a federal right. I would affirm the judgment.

(Endorsed:) Opinion and Dissenting Opinion. Filed Aug. 31, 1951. Paul P. O'Brien, Clerk.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Misc. #555

JAMES NELS EKBERG, *Petitioner*,

v.

RICHARD A. McGEE, Director, California Department of Corrections, et al., and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California, *Respondents*

ORDER

Ekberg transmitted to the Honorable William Denman, Chief Judge of the United States Court of Appeals for the

Ninth Circuit, an application for the writ of habeas corpus Judge Denman, pursuant to Title 28 U. S. C., Sec. 2241(b) transferred the application to the United States District Court for the Northern District of California for hearing and determination.

It appears that the defendant was convicted of two charges in the state court and that the judgment of conviction has become final. He is now serving under the judgment two consecutive sentences in a California State Prison.

He has heretofore applied for the writ of habeas corpus to the Supreme Court of the State of California, apparently upon the same grounds as are alleged in the instant petition. The Supreme Court of the State of California has denied him relief under his petition to that court. Thereafter he applied for certiorari to the United States Supreme Court. The United States Supreme Court has denied that application. He has therefore exhausted his state remedies.

Where a state court has considered and adjudicated the merits of a petitioner's contentions a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated. The state of California accords remedies which give due process of law and there is nothing alleged which presents "exceptional circumstances of peculiar urgency" which entitle him to the issuance of the writ. Ex parte Hawk, 321 U. S. 114; ex rel. Kennedy v. Tyler, 269 U. S. 13. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered.

Huffman v. Smith, 172 F. 2d 129.

Dated: July 31, 1950.

DAL M. LEMMON,
United States District Judge.

APPENDIX C

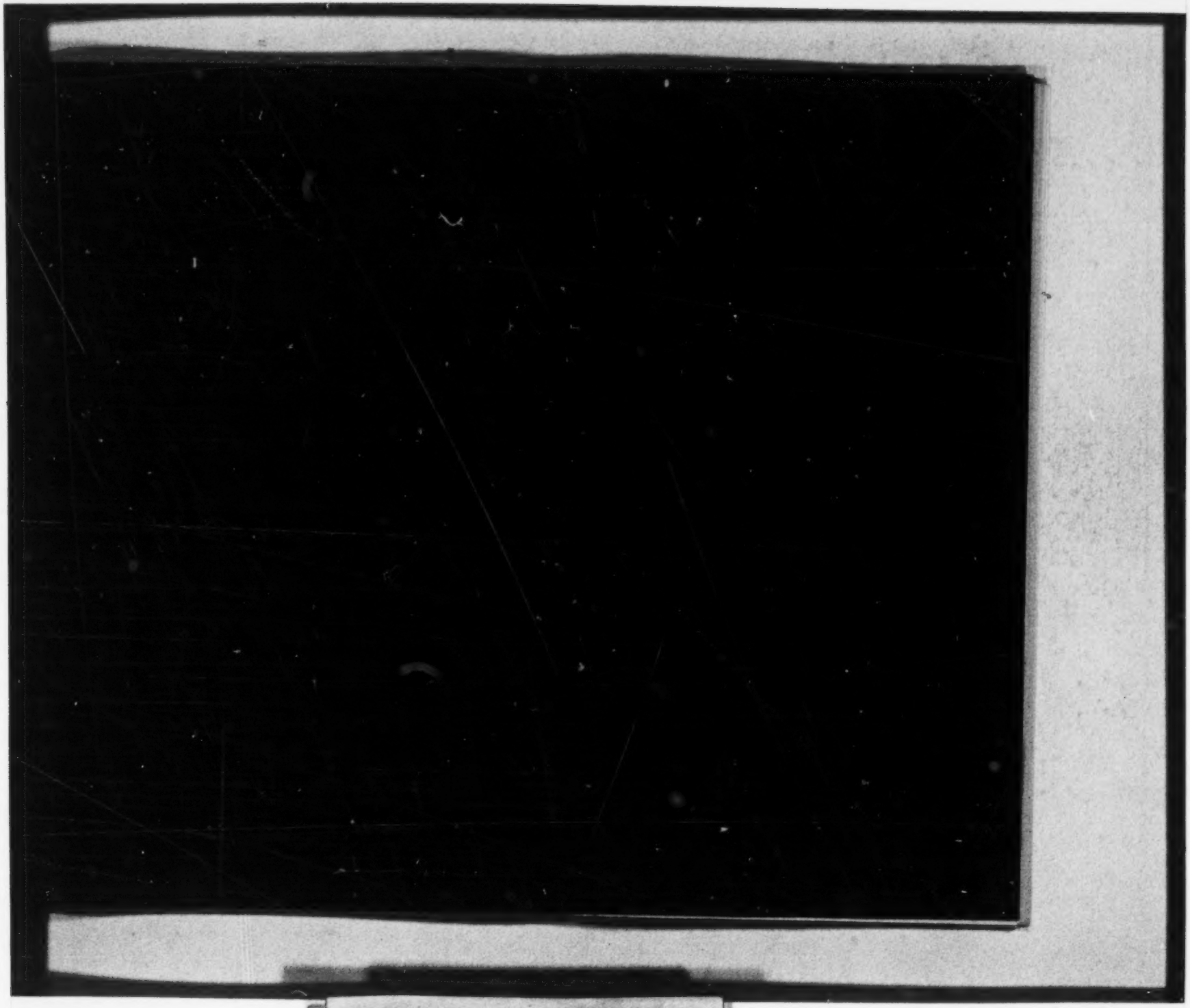
CALIFORNIA PENAL CODE, SEC. 476A

Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depositary, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depositary, or person, or firm, or corporation, for the payment of such check, draft or order, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than fourteen years.

Protest. Where such check, draft or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

"Credit" defined. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary or person or firm or corporation for the payment of such check, draft or order.

Constitutionality. If any of the preceding paragraphs, or parts thereof, shall be found unconstitutional or invalid, the remainder of this section shall not thereby be invalidated, but shall remain in full force and effect. (Added by Stats. 1907, p. 633; Am. Stats. 1915, p. 731; Stats. 1919, p. 238; Stats. 1929, p. 1940.)



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

NO. 517

RICHARD A. McGEE, Director, California State Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California,

Petitioners,

vs.

JAMES NELS EKBERG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

JAMES NELS EKBERG

c/o Allan L. Sapiro
620 Market Street
San Francisco 4, California

In Propria Persona

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

NO. 517

RICHARD A. McGEE, Director, California State Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California,

Petitioners,

vs.

JAMES NELS EKBERG,

Respondent.

* * * * * * *

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Opinions Below

The opinion of the District Court denying respondent the right to file a petition for writ of habeas corpus (R. 30) is not reported. The opinion of the Court of Appeals for the Ninth Circuit, reversing the judgment of the district court and directing further consideration of respondent's application, and the dissenting opinion (R. 40-43) are reported at 191 F. (2d) 625.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

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Question Presented

The question here is whether respondent, who has exhausted all his available state remedies, may be heard on the merits of his application for writ of habeas corpus without showing "exceptional circumstances of peculiar urgency", said application meeting the requirements of 28 U. S. C. § 2254 concerning exhaustion of state remedies.

Statutes Involved

Section 2254 of Title 28, U. S. C. is set forth in the opinion of the Court of Appeals for the Ninth Circuit (R. 40). The other pertinent provision of the habeas corpus sections is 28 U. S. C. § 2243, which provides, in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. . . .
>
> . . .
>
> "Unless the application for the writ and the return presentonly issues of law, the person to whom the writ is directed shall be required toproduce at the hearing the body of the person detained.
>
> . . .
>
> "The court shall summarily hear and determine the facts and dispose of the matter as law and justice require."

Statement

The litigation concerning the petition for writ of habeas corpus is set forth in the Petition (17-18). However a brief examination of the factual background of the petition is necessary to see the questions raised concerning violation of due process.

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In 1949 respondent was convicted in the Superior Court of the State of California of two charges - (a) issuing a check without funds with intent to defraud; and (b) possession of a firearm capable of being concealed upon the person by one previously convicted of a felony. The factual circumstances are set forth in the opinion of the District Court of Appeal, People v. Ekberg (1949) 94 C. A. (2d) 613, 614-616.

Thereafter respondent appealed the judgments of the trial court, and requested permission to orally argue the appeal. This request was denied (R. 25). Respondent then petitioned the appellate court for appointment of an attorney to represent him at the hearing and the oral argument of the appeal. This petition was also denied (R. 25). Thereafter, in the words of the District Court of Appeal, "the appeal was taken by the defendant personally, without the aid of counsel", People v. Ekberg at 613.

Respondent raised numerous issues on the appeal, including (1) that the evidence was not sufficient to sustain the verdict and judgment as to either charge, (2) that the alleged weapon was not a deadly weapon, since it was disassembled, (3) that the previous "felony" respondent had been charged with was a judgment which had been reversed in Ekberg v. United States, 167 F. (2d) 380, (4) that the court erred in giving grossly prejudicial instructions, (5) that the court refused to consider an application for probation, (6) that appellant was without counsel at the time of sentencing, and (7) that the trial judge was biased. The judgment of the trial court was affirmed, a petition for a rehearing was denied November 26, 1949, and respondent's petition for a hearing by the California Supreme Court was denied December 12, 1949.

Thereafter respondent filed a petition for writ of habeas corpus in the California Supreme Court (No. 5086), denied without opinion on March 16, 1950. A petition for a writ of certiorari to this Court was denied without opinion, Ekberg v. California 339 U. S. 969 (1950). Respondent then filed the application in question (R. 1-20) with the Chief Judge of the Court of Appeals for the Ninth Circuit.

The application and petition for writ of habeas corpus set forth numerous questions concerning due process which

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had not been noted previously, including the contentions (1) that the trial court was without jurisdiction of a crime involving an alleged prior conviction, since the conviction alleged in the charge in fact had been reversed; (2) that the joinder of the two separate informations was a denial of due process; (3) that respondent had been deprived of counsel of his own choice; (4) that he had demanded certain witnesses, whom the court authorities and the attorney assigned to respondent refused to subpoena; (5) that the attorney representing respondent was grosaly incompetent, setting forth the several incidents complained of, and (6) that the District Court of Appeal of the State of California refused to allow respondent to appear and personally argue his appeal, and refused to appoint counsel to represent him on his appeal, which resulted in a denial of due process to respondent. The application also set forth the steps taken by respondent to exhaust the remedies in the courts of the State of California, and that he had applied for a writ of certiorari to this Court (R. 1-20).

The District Court, after noting that respondent had exhausted his state remedies, held that "where a state court has considered and adjudicated the merits of a petitioner's contentions a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." (R. 31) "...there is nothing alleged which presents 'exceptional circumstances of peculiar urgency' which entitled him to the issuance of the writ. Ex parte Hawk, 321 U.S. 114; ex rel Kennedy v. Tyler, 269 U.S. 13. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered. Huffman v. Smith 172 F. (2d) 129". (R. 31)

In reversing the judgment of the lower court, the Court of Appeals pointed out that the criteria relied on by the district court is inapplicable to a case where a petitioner has exhausted his state remedies. The requirements of 28 U.S.C. § 2254 are satisfied where the applicant for the writ has once availed himself of his state

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remedies (R. 42). The district court was ordered to give respondent's application its further consideration.

ARGUMENT.

1. The decision of the Court of Appeals for the Ninth Circuit is in accord with the decisions of this Court and with the purpose and intent of the habeas corpus statutes. The District Court erred in having the standard be whether "extraordinary circumstances of peculiar urgency" are presented.

2. The opinion of the appellate court follows the same line of thought and is in accord with decisions rendered by other Courts of Appeal for other circuits, namely the Eighth and Tenth Circuits.

3. On its face the petition and application presents substantial constitutional questions of due process, which warrant the District Court ordering a hearing.

4. The decision of the Ninth Circuit Court attempts to preserve the basic guarantees embodied in the availability of the writ of habeas corpus proceeding.

5. A denial of certiorari by the United States Supreme Court is not res judicata insofar as applications filed in a federal district court are concerned. To sustain such contention of petitioners would be a judicial repeal of the habeas corpus statutes and Section 2254 in particular.

I.

The Decision Of The Court Of Appeals For The Ninth Circuit Is In Accord With The Decisions Of This Court And With The Purpose And Intent Of The Habeas Corpus Statutes.

The District Court was in error in attempting to have as its standard a presentation of "extraordinary circumstances of peculiar urgency."

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Section 2243, Title 28 U.S.C. directs that a court, justice or judge entertaining an application for a writ of habeas corpus, shall forthwith award the writ or issue an an order to show cause order, unless it appears from the application that the applicant or person detained is not entitled to such writ or order to show cause (supra, p. 2). For a person in custody pursuant to a judgment of a state court, § 2254 requires an application show that such person has exhausted the remedies available in the courts of the state, or that there is no available state corrective process, or circumstances exist that render such state process ineffective to protect the rights of the state prisoner.

(Emphasis added)

As noted by this Court in Darr v. Burford (1949) 339 U.S. 200, 207, in restating the rule of Ex parte Hawk (1944) 321 U.S. 114, 116, 117, "Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted."

The case now before this Court goes one step further and raises the issue whether, after an applicant has exhausted all his remedies in the state courts and in this Court, may the District Court arbitrarily refuse to entertain a petition and have a full hearing to determine if the relief prayed for should be granted or denied.

All of the cases relied on by the District Court (R. 31) are circumstances where the petitioner had not exhausted or where it was not shown that petitioner had exhausted his state remedies. Furthermore, it must be pointed out that in Ex parte Hawk (1944) 321 U.S. 114 at 116, this Court explained:

> "The statement that the writ if available in the federal courts only 'in rare cases' presenting 'exceptional circumstances of peculiar urgency' often quoted from the opinion of this Court in United States ex rel Kennedy v. Tyler, 269 U.S. 17

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> was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies and in which he makes a substantial showing of a denial of a federal right". (Emphasis added)

Thus the rule relied on by the District Court is not applicable to the facts herein, where, as admitted by the Court, the petitioner had exhausted his opportunity for relief in the state courts.

The Reviser's Notes point out that Section 2254 was a new section, as of September 1, 1948, declaratory of existing law as affirmed by the Supreme Court, and cites Ex parte Hawk (1944) 321 U.S. 114. A comparison of Section 2254 with the above quoted excerpt from the latter decision, clearly shows that both intend that an application show either an exhaustion of state remedies or rare or unusual circumstances, e.g. no state corrective process, or circumstances which prevent petitioner from using such process. This is exactly what the opinion of the Court of Appeals for the Ninth Circuit demonstrates by italici ing the alternatives. (See Petition, 33, 34).

The opinion of this Court in Hawk v. Olson (1945) 326 U.S. 271, discusses the liberalization of habeas corpus proceedings in the federal courts, for the purpose of safeguarding the liberty of all persons within the jurisdiction of the United States against the infringement through any violation of the Constitution, even though the events which were alleged to infringe did not appear upon the face of the record of conviction. 326 U.S. at 274. In the words of the court:

> "When the corrective process is provided by the State, but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." (326 U.S. at 276)

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In Hawk v. Olson, supra, as in the present litigation, this Court had before it an applicant who claimed among other things, denial of an opportunity to examine the charge, subpoena witnesses, consult counsel, and prepare a defense. This Court held that a denial of effective assistance of counsel does violate due process. Powell v. Alabama, 287 U.S. 45, 58; House v. Mayo, 324 U.S. 42, 46. Then, in the same fashion as the Court of Appeals in the case herein, this Court said "Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity." (See Walker v. Johnston, 312 U.S. 275, 285 (1940))

II.

The Opinion Of The Court Of Appeals For The Ninth Circuit Is In Accord With Decisions Rendered In The Eighth and Tenth Circuits.

The petitioners herein rely on decisions of various circuits as being contrary to the opinion of the Court of Appeals for the Ninth Circuit. The cases cited by petitioners sorrowfully show the lack of understanding of the purpose of the writ of habeas corpus evidenced by opinions of some of our most prominent federal jurists.

In Goodman v. Lainson (C. A. 8th 1950) 182 F(2d) 814, the Court of Appeals reviews the decision of the trial court denying the petition; and then goes on to point out that when the trial court dismissed the application because it did not present "special circumstances" it overlooked the fact that this rule is applicable only where the petitioner has failed to pursue all of his available remedies in the state court. The appellate opinion goes on to cite Ex parte Hawk 321 U.S. 114, and how it explains that the "peculiar urgency" rule is inapplicalbe where the petitioner has exhausted his state remedies. In the words of that appellate opinion:

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"The trial court may be convinced on examination of the record on prior hearings that the merits of appellant's claims have already been determined against him on previous applications or that he had not exhausted his state remedies with respect to such claims. This, however has not been done, and the record before us is insufficient to enable us to do so. The case has been disposed of on an erroneous theory which we think requires reversal. The order appealed from is therefore reversed and the cause remanded for further proceedings consistent with this opinion." 182 F. (2d) at 816.

See: Miller v. Hudspeth (C. C. A. 10th 1949) 176 F. (2d) 111
United States v. Sullivan (E.D. Ill. 1944) 55 F. Supp. 548

The decisions cited by petitioners perhaps are represented by Schechtman v. Foster (C. A. 2d 1949) 172 F. (2d) 339, where a denial of a petition for certiorari by this Court (339 U. S. 924 (1950)) was held to be conclusive on the merits of a subsequent petition for writ of habeas corpus, although it is generally understood that a denial of a petition for writ of certiorari is not an adjudiciation on the merits, Darr v. Burford 339 U. S. 200, 226 (1949).

III.

On Its Face The Application Presented Substantial Constitutional Questions Of Due Process

One of the most important questions presented in respondent's application is that of being denied the right of both personal appearance and having counsel represent him at his appeal. The application clearly alleges that respondent made known to the appellate court that he felt the need of counsel and had been unable to procure one and that he asked the court to appoint counsel to assist him.

In view of the many questions of law involved in respondent's appeal, e. g. the propriety of being charged with a prior conviction when the judgment had been reversed; being

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charged with carrying a deadly weapon, when People v. DeSylva 143 Cal. 62, holds that an unloaded gun is not a deadly weapon, and California Penal Code § 417 makes it only a misdemeanor to exhibit or draw loaded or unloaded firearms; the improper representation of respondent by counsel at the trial; the refusal to subpoena witnesses as requested by respondent -- having counsel appointed by the District Court of Appeal of the State of California might have made a substantial difference in the outcome of the case. Certainly it is not unreasonable to ask the District Court to weight this fact, in conjunction with other facts in the case, in determining whether petition was deprived of his constitutional right to a fair trial.

As this Court said in Powell v. Alabama (1932) 287 U. S. 45, 69, "He (the layman) requires the guiding hand of counsel at every step in the proceedings against him." The right to have counsel appointed is a logical corollary from the constitutional right to be heard by counsel. Johnson v. Zerbst 304 U. S. 458.

In Garrison v. Johnston (C. C. A. 9th 1939)104 F. (2d) 128, cert. den. 308 U. S. 553, rehrg. den. 308 U. S. 636, the Court of Appeals made the same quotation from the Powell case, when it pointed out that in the absence of any showing that appellant requested the appellate court to appoint counsel for him to assist in his appeal, there was no question before the court relating to his being without counsel in such appellate court. Is not the converse also true, namely that where appellant did request the appellate court to appoint counsel, there is a question before the court as to his being without counsel?

Practically speaking, the only way that respondent may raise the question of being deprived of counsel is by a writ of habeas corpus, for the District Court of Appeal is not going to condemn itself for its own action in the course of the appeal. The action of the District Court in refusing to consider respondent's application for habeas corpus was a refusal to consider the question of respondent's being deprived of the assistance of counsel, a right guaranteed under the Constitution of the United States and under the Constitution of the State of California (Article I, § 13).

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IV.

The Decision Of The Ninth Circuit Court Attempts To Preserve Constitutional Rights By Having The District Court Examine The Application Of The Respondent.

As heretofore pointed out, there are several substantial questions of due process appearing on the face of the application of respondent. Petitioners filed no document or pleading in opposition, and therefore respondent contends that the statements on the face of the application should be considered by the District Court as being true, at least for purposes of ordering an order to show cause hearing.

In his dissent, Judge Healy admits that not all of the points raised have been considered by the California appellate court. And contrary to his statement, the remaining points, namely deprivation of counsel, show a substantial deprivation of federal rights, as carefully explained in Powell v. Alabama 287 U.S. 45 and Hawk v. Olson, 326 U.S. 271.

In their appearance before the Court of Appeals, petitioners conteded that the writ of habeas corpus process in the state courts was inexhaustible, and that respondent had not exhausted his state court remedies. An examination of two recent California decisions shows that the contrary is true. A proceeding in habeas corpus may be res judicata insofar as subsequent proceedings are concerned. In re Horowitz 33 C. (2d) 534, 547 (1949); In re Browning 99 C. A. (2d) 337, 338 (1950).

An examination of respondent's application clearly shows a presentation of factual statements which raise fundamental questions of due process and constitutional irregularity, which warranted at least a hearing by the District Court.

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A Denial Of Certiorari By The Supreme Court Of The United States Is Not Res Judicata

As discussed heretofore, this Court in Darr v. Burford 339 U.S. at 226, has made it clear that a denial of a petition for writ of certiorari has no bearing whatever on the merits of the claim. The denial means only that this Court has refused to take the case.

Petitioners decry a federal district court having the right to consider an application for writ of habeas corpus after the state courts have refused relief and this Court has refused to review the refusal of the state courts (Petition, 40).

This Court has said that a denial of a writ of certiorari imports no expression of an opinion upon the merits of the case. Atlantic C. L. R.R. v. Powe 238 U.S. 401; (1931); United States v. Carver 260 U.S. 482 (1923); Shapiro v. King 38 F. Supp. 33 (S.D. Mo. 1941). Since a denial of certiorari means only that fewer than four members of the court deemed it desirable to review a decision of a lower court, and in no way is an adjudication on the merits, the discretionary power of the lower federal courts to entertain petitions for writs of habeas corpus should not be disturbed, Maryland v. Baltimore Radio Show 338 U.S. 912, 917 (1950).

If a prisoner of the state believes his case has merit after certiorari has been denied, he should not be deprived of the opportunity to petition the lower federal courts for a writ of habeas corpus. Here respondent sought to have his constitutional rights determined after a hearing, which was the purpose of "the great and efficacious writ"- habeas corpus ad subjiciendum - since its inception. 3 Blackstone's Commentaries 129-132. In accord with this Court's opinion in Darr v. Burford 339 U.S. at 228, the right of a District Court to entertain a petition for habeas corpus after a prior denial of certiorari is not qualified.

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CONCLUSION

The question remains to be decided by this Court as to the standard the district courts should use in granting a hearing on an application for a writ of habeas corpus when the petitioner has exhausted all available remedies in the state courts. It is only with such a guide will the conflict between the several circuits end. Without such standard the confusion, the vagueness, the indefiniteness that has prevailed in this field of law must continue.

Although respondent respectfully submits that this petition for a writ of certiorari should be denied, he feels that the attention of this Court should directed to this problem and the need for its clarification.

Respectfully submitted,

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In Propria Persona

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 517

RICHARD A. McGEE, Director, California Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California,
Petitioners,

v.

JAMES NELS EKBERG,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

We ask leave to file this supplemental brief in support of our petition for certiorari in an effort to emphasize the growing conflict between divisions of the Ninth Circuit and between one division of the Ninth Circuit and the other circuits.

THE DECISION OF THE COURT OF APPEALS, NINTH CIRCUIT, IS IN CONFLICT WITH OTHER DECISIONS OF THAT COURT AND WITH DECISIONS OF THE OTHER CIRCUITS

If this court should decide that the petitioner has exhausted his remedy in the state court, including

certiorari to the Supreme Court of the United States, then we contend that the action of the district court in denying the petition of appellant was correct and within the rule announced in *Ex parte Hawk,* 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572:

> "Where the state courts have considered and adjudicated the merits of his contentions, and this court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated."

This rule was subsequently followed with approval in the cases of *House* v. *Mayo,* 324 U. S. 42, 48, 65 S. Ct. 517, 89 L. Ed. 739, 743, *White* v. *Ragen,* 324 U. S. 760, 764-765, 65 S. Ct. 987, 89 L. Ed. 1348, 1352, with but one indicated limitation, i.e., where the state court lacks jurisdiction to review the decision. Since *Mooney* v. *Holohan,* 294 U. S. 103, 55 S. Ct. 340, 69 L. Ed. 1036, no one has doubted the power of the California courts to act effectively in situations such as attempted to be presented here.

The Ninth Circuit has long followed the rule announced in *Ex parte Hawk, supra.* In the case of *Bird* v. *Smith,* (9th Cir.) 175 Fed. 2d 260, Chief Judge Denman said:

> "Here are no exceptional circumstances since, as stated, the federal issue before the state supreme court and the United States Supreme Court was determined on the same evidence of claimed

coercion as before the district court was not entitled to consider such a repeated application for the writ."

The Ninth Circuit has followed the rule in the following cases: *Ex parte Adamson,* 167 Fed. 2d 996, *Gordon* v. *Scudder,* 163 Fed. 2d 518, and *Tate* v. *People,* 187 Fed. 2d 98.

It departed from that holding in this case. (191 Fed. 2d 625). In this case, Chief Judge Denman in an opinion joined in by Judge Orr abandoned the position taken by Chief Judge Denman in the *Bird* case (175 Fed. 2d 260). Judge Healy dissented. The court justifies its departure from the rule in the *Hawk* case by relying on 28 U. S. C. Sec. 2254.

The code revisers when they proposed this new section made this note:

> "This new section [28 U. S. C. sec. 2254] is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. Ed. 572.)"
> 80th Congress House Report No. 308.

Either Judge Parker and his revisers didn't know what they were doing or the Ninth Circuit court failed to realize the significance of Sec. 2254 when it rendered its decision in the *Ekberg* case (191 Fed. 2d 625).

We think that we have demonstrated that at the present moment there is a conflict between the panels of judges sitting in the Ninth Circuit and also an

unresolved conflict between Chief Judge Denman in the *Bird* case (175 Fed. 2d 260) and Chief Judge Denman in the *Ekberg* case (191 Fed. 2d 625).

As far as arithmetic is concerned we have two judges of the Ninth Circuit following the *Ekberg* case and five following the *Bird* case.

The rule here contended for is followed in the First, Second, Fourth, Fifth, Seventh and Eighth Circuits as will be discovered from an examination of the following authorities:

Second Circuit:

"But even if state remedies have been exhausted, a federal court will not ordinarily, where a state court has considered and adjudicated the merits of a petitioner's contentions, re-examine upon writ of habeas corpus the questions then adjudicated, provided that the state has accorded remedies which give 'due process of law'." (Citing *Ex Parte Hawk, House* v. *Mayo* and other cases.) *U. S. ex rel. Morrison* v. *Foster,* 175 Fed. 2d 495.

See also: *U. S. ex rel. Carr* v. *Martin* (2 Cir.) 172 Fed. 2d 519, 521; *Schechtman* v. *Foster* (2 Cir.) 172 Fed. 2d 339, 341; *U. S. ex rel. Steele* v. *Jackson* (2 Cir.) 171 Fed. 2d 432, 433; *U. S. ex rel. Monsky* v. *Warden,* 163 Fed. 2d 978.

Fourth Circuit:

"In the Brown case the petition for the writ was denied without hearing, on the basis of its

procedural history. We think that dismissal in both cases was clearly right. In view of the action of the state Supreme Court upon the identical questions presented to the court below and the denial of certiorari by the Supreme Court of the United States, the cases fall squarely within the rule that 'a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated.' "

Speller v. *Allen*, 192 Fed. 2d 477, 478.

See also: *Daniels* v. *Allen*, 192 Fed. 2d 763; *Goodwin* v. *Smyth*, 181 Fed. 2d 498; *Haughey* v. *Smyth*, 170 Fed. 2d 68; *Bernard* v. *Brady*, 164 Fed. 2d 881; *Stonebreaker* v. *Smyth*, 163 Fed. 2d 498.

Fifth Circuit:

" 'Where a state court has considered and adjudicated the merits of a petitioner's contentions, and this court [U. S. Supreme Court] has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated'." (Citing *House* v. *Mayo*.)

Bailey v. *Stoutamire*, 155 Fed. 2d 754.

" 'Where the state courts have considered and adjudicated the merits of his contentions, and [the Supreme Court of the U. S.] has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-

examine upon writ of habeas corpus the question thus adjudicated'." (Citing the *Hawks* case.)

U. S. ex rel. Weber v. *Ragen,* 176 Fed. 2d 579.

See also: *U. S. ex rel. Holderfield* v. *Ragen,* 170 Fed. 2d 189.

Eighth Circuit:

"What did the Supreme Court mean by 'not ordinarily'? We understand the direction of the Supreme Court to be that only in extraordinary cases will a federal court re-examine upon Habeas Corpus questions fully and fairly adjudicated on the merits by the State courts *and passed upon by the Supreme Court.* The rule, as stated, does not of course preclude a re-examination on Habeas Corpus of an extraordinary case by any federal court. And it leaves to those courts the exercise of some discretionary judgment in determining in each such the question of whether that case is one of such a nature that the scrupulous protection of constitutional rights justifies or requires a further hearing. See Wade v. Mayo, 334 U. S. 672, 68 S. Ct. 1270."

Mart v. *Lainson,* 169 Fed. 2d 1016, 1019.

So, in the instant case, as in the case of *Mart* v. *Lainson,* just cited, the district judge exercised his discretion and denied the writ, saying:

"Petitioner has had his allegations considered in the highest tribunals both federal and state.

Hence, I have no further jurisdiction in this matter and the application is denied." (R. 17).

Petitioners respectfully urge that this court grant the petition for certiorari heretofore filed in this matter.

Respectfully submitted,

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IN THE

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RICHARD A. McGEE, Director, California Department of Corrections, and ROBERT A. HEINZE, Warden, California State Prison for Men, at Represa, California,
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v.

JAMES NELS EKBERG,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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Respondent.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court (R. 30-31) is not reported. The original opinion of the court of appeals (R. 40-43) and the dissenting opinion is reported at 191 F. 2d 625. The opinion of the court of appeals, as amended, and the dissenting opinion is reported at 194 F. 2d 178.

JURISDICTION

The judgment of the court of appeals was entered August 31, 1951 (R. 43-44). A petition for rehearing was filed on October 1, 1951, which was denied by the court of appeals on October 25, 1951 (R. 44). The petition for certiorari was filed January 8, 1952, and was granted March 10, 1952. The jurisdiction of this court rests on 28 U. S. C. 1254(1), 28 U. S. C. 2101(c). See, also, Rule 38(5)(b).

QUESTION PRESENTED

Whether a federal district court must entertain a petition for writ of habeas corpus by one confined under a final judgment of a state court where the petition on its face alleges that the petitioner has exhausted his state remedies but where the petition fails to show a substantial federal question and exceptional circumstances of peculiar urgency, or if it may deny leave to file such petition without a hearing?

STATUTE INVOLVED

"Section 2254. State custody; remedies in State courts

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances

rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

STATEMENT OF THE CASE

Prior State Proceedings

Respondent was convicted in the Superior Court of the State of California, in and for the County of San Diego, on two counts: one, issuing a check without funds with intent to defraud; and second, possession of a firearm capable of being concealed upon the person by one previously convicted of a felony. This judgment was affirmed on appeal by the Fourth District Court of Appeal of the State of California in the case of *People* v. *Ekberg,* 94 C. A. 2d 613, 211 P. 2d 316. A petition for rehearing was denied. A petition for hearing in the California Supreme Court was denied December 12, 1949 (*People* v. *Ekberg,* 94 C. A. 2d, 613, 619, 211 P. 2d 316). Certiorari was not sought. Later, a petition for habeas corpus was filed in the California Supreme Court, numbered Crim. 5086, which was denied without opinion on March 16, 1950. An application to this court for writ of certiorari was denied without opinion on May 29, 1950 (*Ekberg* v. *California,* 339 U. S. 969, 94 L. Ed. 1377, 70 S. Ct. 986).

Proceedings in the Courts Below

Respondent herein (applicant) sought to file a petition for writ of habeas corpus with Hon. William Denman, Chief Judge of the U. S. Circuit Court of Appeal for the Ninth Circuit. Judge Denman, pursuant to 28 U. S. C. 2241(b) transferred said application to the U. S. District Court for the Northern District of California (R. 30). The Honorable Dal M. Lemmon, Judge of said court, by his order filed July 31, 1950, denied to respondent the right to file the petition in forma pauperis on the ground that there was nothing alleged therein which presented "exceptional circumstances of peculiar urgency" which entitled him to the issuance of the writ even though he had alleged exhaustion of state remedies (R. 30-31). A certificate of probable cause was granted (R. 34). The record was filed in the court of appeals and upon the applicant's request, counsel was appointed to represent him (R. 20). Thereafter briefs were filed, the matter argued orally, and after submission the court of appeals issued its opinion reversing the judgment of the district court and ordered the district court to give the matter its further consideration (R. 40-44). A petition for rehearing was filed within rule time and was denied by said court (R. 44). A petition for writ of certiorari was filed with this court on January 8, 1952 (R. 44). Thereafter and on January 30, 1952, the court of appeals amended its opinion to hold that under California law the state corrective process

was not inexhaustible (R. 42). Certiorari was granted by this court on March 10, 1952 (R. 44).

In his petition for writ of habeas corpus which was denied by the Federal District Court, the applicant attacked the state judgments under which he was confined, on the following grounds:

(1) That the trial court lacked jurisdiction as his prior conviction was erroneously charged;
(2) That there was insufficient evidence to justify his conviction of issuing a check without sufficient funds pursuant to Sec. 476a of the Penal Code of the State of California, and insufficient evidence before the magistrate to justify his having been held for trial;
(3) That the joinder of the two separate informations for trial resulted in a denial to him of due process of law;
(4) That he was deprived of counsel of his own choice and his counsel was grossly incompetent;
(5) That certain defense witnesses demanded by him were not subpoenaed, although he had so requested his counsel;
(6) That he was twice placed in jeopardy for the same offense by reason of the joinder of offenses for trial and the fact that the sentences were ordered to run consecutively;
(7) That he was denied an opportunity to appear and personally argue his cause on his appeal in the District Court of Appeal of the State of California, in and for the Fourth Appellate District, or to have counsel appointed to represent him on such oral argument which resulted in a lack of due process of law. (R. 1-20)

In denying the applicant leave to file this petition for writ of habeas corpus in forma pauperis, Hon. Dal M. Lemmon, United States District Judge, stated:

> "It appears that the defendant was convicted of two charges in the state court and that the judgment of conviction has become final. He is now serving under the judgment two consecutive sentences in a California State Prison.
>
> "He has heretofore applied for the writ of habeas corpus to the Supreme Court of the State of California, apparently upon the same grounds as are alleged in the instant petition. The Supreme Court of the State of California has denied him relief under his petition to that court. Thereafter he applied for certiorari to the United States Supreme Court. The United States Supreme Court had denied that application. He had therefore exhausted his state remedies. Where a state court has considered and adjudicated the merits of a petitioner's contention a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. The State of California accords remedies which give due process of law and there is nothing alleged which presents 'exceptional circumstances of peculiar urgency' which entitle him to the issuance of the writ. Ex parte Hawk, 321 U. S. 114; ex rel. *Kennedy* v. *Tyler*, 269 U. S. 13. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered. *Huffman* v. *Smith*, 172 F. 2d 129." (R. 30-31)

The majority opinion of the circuit court of appeals held: "We think the district court erred in holding exceptional circumstances must be shown before the

federal court or judge may be called upon to exercise the discretion described in *Huffman* v. *Smith*, supra, 172 F. 2d 130." (R. 40-43)

The dissenting opinion of Circuit Judge Healy contained the following language:

> "The appeal is from an order denying an application for leave to file a habeas corpus petition *in forma pauperis*. Such an application is addressed to the discretion of the trial court, Huffman v. Smith, 9 Cir., 172 F. 2d 129, Tate v. People, 9 Cir., 187 F. 2d 98, and I am unable to see that the court abused its discretion. The petition for the writ presented no question of substance. Most of the points raised had been fully considered by the California court on appeal from the judgment of conviction, People v. Ekberg, 94 Cal. App. 2d 613, 211 P. 2d 316, and their lack of merit exposed. In respect of points not urged on the direct appeal there is likewise no substantial showing of the denial of a federal right. I would affirm the judgment." (R. 43)

SUMMARY OF ARGUMENT

The petition for writ of habeas corpus on its face did not present a substantial federal question nor disclose extraordinary circumstances of peculiar urgency. The action of the district court in denying applicant leave to file the writ in forma pauperis was proper. The action of the ninth circuit court in reversing the district court and in holding that after an applicant has exhausted his state remedies it is not necessary for him to show "exceptional circumstances of peculiar urgency" is not in accord with the provisions of

Section 2254, Title 28 U. S. C., nor is it in accord with the rationale of *Darr* v. *Burford,* 339 U. S. 200, or *Ex parte Hawk,* 321 U. S. 114. This decision of the ninth circuit court impedes the orderly administration of justice and fails to give any weight to the proceedings in the state court or to the denial of certiorari by this court of the highest state court's decision in the same matter.

ARGUMENT

I. The Petition for Writ of Habeas Corpus on Its Face Does not Present a Substantial Federal Question nor Disclose Extraordinary Circumstances of Peculiar Urgency. The Holding of The United States District Court to This Effect Was Correct and the Reversal Thereof by the Ninth Circuit Court Erroneous

The district court in the instant proceeding followed the procedure set forth in the case of *Dorsey* v. *Gill,* 148 F. 2d 857 (cert. den. 325 U. S. 890, 89 L. Ed. 2003) which case suggested the procedures to be adopted by federal courts upon an application for writ of habeas corpus, namely: "(1) When a petition is presented to a judge with request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; * * * " (148 F. 2d 857, 865). The district court found that the applicant had exhausted his state remedies, that the questions presented had been ruled upon by the state courts and certiorari denied by this court and that no "extraordinary circumstances were presented of peculiar urgency" which justified the intervention of a federal district court.

A. THE ALLEGATIONS OF THE PETITION FOR WRIT OF HABEAS CORPUS DO NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The applicant's first contention that the state trial court had no jurisdiction because the allegation of the information as to his prior conviction was not sustained (R. 4-6) was fully considered and rejected by the District Court of Appeal of the State of California, in and for the Fourth Appellate District, in *People* v. *Ekberg*, 94 C. A. 2d 613, 617-618, 211 P. 2d 316, wherein the court stated:

> "The information charged that the appellant had previously, on April 24, 1942, been convicted of a felony, 'Impersonation of a U. S. Officer,' with imprisonment under certain numbers in Leavenworth and Atlanta prisons, and that this judgment had never been reversed or set aside. It is now contended that this charge was not sustained, and that the charge of a former conviction is 'illegal and void' since it developed at the trial that this former judgment had actually been reversed in the case of *Ekberg* v. *United States*, 167 F. 2d 380. When the district attorney attempted to introduce evidence that the appellant had been previously convicted as alleged in the information appellant's counsel stipulated that he was so convicted, and the appellant personally joined in this admission. It was then stipulated that the appellant was, on April 24, 1942, in the United States District Court at Puerto Rico, convicted of the crime of felony, to wit, impersonation of a United States officer; that judgment was pronounced on that date; that the appellant served a term of imprisonment in the United States penitentiary at

Leavenworth and at Atlanta; and 'that said judgment has never since been reversed, annulled or set aside.' An objection to the introduction of evidence to establish these facts was then made on the ground that the facts had already been established, and was sustained. At the close of the appellant's evidence, he himself tried to raise the contention that the case above cited had reversed his conviction. His counsel assured the judge that he had read this case, that there was only a partial reversal for an error in giving consecutive sentences under different counts, that there was nothing at all wrong with one sentence, and that what happened in connection with that reversal had 'not a thing' to do with the issue presented in this case. There is nothing in the case cited which would have the effect here contended for, and the defendant is bound by the stipulations and admissions which were made. It is further contended, in this connection, that the jury should have been advised that the defendant had served an extra period of imprisonment and probation under that former conviction, as was developed after a part of the judgment was reversed. This was not material to any issue here and no error appears in that connection."

A review of the court's decision in *Ekberg* v. *United States*, 167 F. 2d 380, reveals that although one count of a three-count indictment for impersonation of a federal officer (18 U. S. C. A. Sec. 76) was held to be improper, the other two counts of the indictment were held proper and the applicant held to be properly convicted on counts two and three of said indictment.

Since he was merely charged in the state courts with a prior felony conviction of "Impersonation of a U. S. Officer" and the service of sentence in a federal penitentiary, therefore, it is apparent that this was correct and any contention of error in this respect was without merit.

As to the applicant's second contention that the information failed to charge an offense pursuant to the provisions of Sec. 476a of the Penal Code of the State of California and that he was held to answer by the committing magistrate without reasonable or probable cause (R. 6-7), these points were fully covered in the opinion of the District Court of Appeal of the State of California, in and for the Fourth Appellate District, in the decision in *People* v. *Ekberg*, 94 C. A. 2d 613, 615-616. By both this court and the state courts it has long been settled that the writ of habeas corpus cannot be used for the purpose of proceedings in error and that the sufficiency of the evidence to support the conviction may not be inquired into under the writ. (*Sunal* v. *Large*, 332 U. S. 174, 67 S. Ct. 1588; *Frank* v. *Mangum*, 237 U. S. 309, 35 S. Ct. 582; *In re Connor*, 16 C. 2d 701, 108 P. 2d 10; *In re Razutis*, 35 C. 2d 532, 219 P. 2d 15.) Thus it is patent that this contention does not present a substantial federal question.

With relation to the applicant's third contention that he was deprived of counsel of his own choice or that his counsel was incompetent (R. 8-13), this point is negated by the record as well as the petition itself. The applicant did not present this question on

the appeal from the original judgment nor did he at any time during the proceedings in the trial of said matter seek to raise this point. The state courts in reviewing the applicant's record on appeal found that he had a fair trial and affirmed the judgment of the trial court (*People* v. *Ekberg*, 94 C. A. 2d 613, 211 P. 2d 316). The applicant's further contention that he was denied the presence of defense witnesses because of the incompetency of his counsel (R. 10-11) does not constitute a denial of due process of law. The question of the competency or incompetency of his counsel was a question of fact to be passed upon by the courts of the State, which found that the applicant had a fair trial. The federal courts are not charged with a review of the strategy of defense counsel (*Burkett* v. *Mayo* (5 Cir.) 173 F. 2d 574). A defendant is entitled to a fair trial, not a perfect one. His counsel is not required to be infallible (*U. S. ex rel. Feeley* v. *Ragen* (7 Cir.) 155 F. 2d 976). It is only in those cases where the record discloses that counsel for an applicant was so lacking in competence that it amounted to no defense at all and on the failure of a trial judge and prosecuting attorney to observe and correct such conduct would a denial of a fair trial result and hence a denial of due process of law. Clearly, in the instant matter, the applicant has in no manner demonstrated that the circumstances surrounding his trial shocked the conscience of the court and that the proceedings were but a farce and a mockery of justice (23 *C. J. S.* Criminal Law, Sec. 1443; 24 *C. J. S.* Criminal Law, Sec. 1948, p. 1112).

In the light of the decisions of this court, it is apparent that this contention of the applicant does not present a question of substantial importance as to a deprivation of his constitutional rights (*Ex parte Hawk*, 321 U. S. 114, 115-116, 64 S. Ct. 448, 88 L. Ed. 572; *Powell* v. *Alabama*, 287 U. S. 45, 68-70, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; *Moore* v. *Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543).

With relation to the applicant's fourth contention—that the joinder of the two separate informations for trial resulted in a denial to him of due process of law (R. T. 14-15), the record discloses that the joinder was made at the applicant's request and he may not attack such joinder on habeas corpus (*People* v. *Ekberg*, 94 C. A. 2d 613, 211 P. 2d 316). The question of joinder is regulated by the law of the State and the Fourteenth Amendment does not control mere forms of procedure in the state courts or regulate the practice therein (*Holden* v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383; *Hurtado* v. *State of California*, 110 U. S. 516, 4 S. Ct. 111; *People* v. *Burton*, 91 C. A. 2d 695, 205 P. 2d 1065 (cert. den. 338 U. S. 886)).

As to the applicant's contention that he was not afforded a probation hearing and that judgment and sentence were improperly imposed (R. 14-15), this point is fully considered in the decision of the district court of appeal in *People* v. *Ekberg*, 94 C. A. 2d 613, 618-619, and a review thereof discloses that it does not present a substantial federal question (*Williams*

v. *New York*, 337 U. S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079).

Applicant's contention that he was denied the right of appeal in that the District Court of Appeal of the State of California did not permit him to orally argue his matter or to appoint counsel to argue this matter for him (R. 15-16) clearly does not present a substantial federal question. The assistance of counsel on appeal or the right of an appellant to be personally present and argue the matter is a question within the discretion of the appellate court and an appellant as a matter of right is not entitled to be produced. The refusal of this right does not involve a lack of due process of law or present a substantial federal question (*Price* v. *Johnson*, 334 U. S. 266, 68 S. Ct. 1049, 92 L. Ed. 1356; Annotation, 19 A. L. R. 2d 789, 822-823).

Thus petitioners herein submit that the petition for writ of habeas corpus disclosed a lack of a substantial federal question and the action of the district court in denying applicant the right to file such petition in forma pauperis did not constitute an abuse of its discretion or support the finding by the Ninth Circuit Court of Appeals that the district court should further consider the matter.

B. NO CIRCUMSTANCES OF PECULIAR URGENCY ARE DISCLOSED BY SAID PETITION FOR WRIT OF HABEAS CORPUS

In the case at bar as appears from the record before the district court, the applicant was given a fair trial in the state courts. His case was fully reviewed on

appeal from the original judgment (*People* v. *Ekberg*, 94 C. A. 2d 613, 211 P. 2d 316). In his petition for writ of habeas corpus presented to the California Supreme Court (Crim. 5086) the same points as were sought to be raised in the petition in the Federal District Court were presented to the State Supreme Court. That court denied the petition for writ of habeas corpus without opinion and this court denied certiorari (*Ekberg* v. *California*, 339 U. S. 969, 94 L. Ed. 1377, 70 S. Ct. 986).

We are not confronted in this case with the use of a forced confession, denial of counsel to an accused and thus no opportunity to protect his rights, the use of perjured testimony knowingly by the prosecution in order to obtain a conviction, a conviction occurring under the influence of a mob spirit or community coercion. The applicant's petition merely presents matters which could and should have been presented to the state courts on the trial and appeal from the original judgments.

The Supreme Court of the State of California had the matters presented to them on a petition for a hearing after decision by the district court of appeal in *People* v. *Ekberg*, 94 C. A. 2d 613, 211 P. 2d 316, and again on the petition for writ of habeas corpus, Crim. 5086. In neither case did the Supreme Court find such error in the record as would warrant their

taking jurisdiction of the matter. Patently, on the record before the district court and the prior state court record it may not be said that such a gross violation of the applicant's constitutional rights occurred as would warrant a federal court finding that there was a lack of "due process" in the state proceedings theretofore had so as to deny the applicant the substance of a fair trial and thus oust the state court of jurisdiction to impose the sentence. It may not be successfully urged in the case at bar that the applicant was not present in the state court and convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards (*Collins* v. *Frisbie*, 342 U. S. ____, 96 L. Ed. Adv. 396).

Thus it would appear that the dissenting opinion of Circuit Judge Healy to the effect that the petition for the writ presented no question of substance as most of the points raised had been fully considered by the California courts and their lack of merit exposed and in respect of points not urged on the direct appeal that there was no substantial showing of the denial of a federal right, is clearly borne out by the record and the majority opinion which is contrary thereto is erroneous and should be reversed (*Ekberg* v. *McGee*, 191 F. 2d 625, 194 F. 2d 178).

II. The Decision of The Ninth Circuit Court of Appeals Is Not in Accord With the Rationale of Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; Ex Parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; or 28 U. S. C. 2254

The ninth circuit court in reaching the majority opinion in this case interpreted Section 2254, Title 28 U. S. C. which reads, in part:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, *or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.*" (Emphasis supplied.)

so that the italicized alternatives after the word "or" have no application, where, as here, there is an effective state remedy of which the applicant has availed himself. The court further states that the language of *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, that the writ is available in the federal courts only "in rare cases" presenting "exceptional circumstances of peculiar urgency" is inapplicable to a case in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right and that *Darr* v. *Burford*, 339 U. S. 200, 211, 70 S. Ct. 587, 94 L. Ed. 761, so recognizes.

This court in neither the cases of *Darr* v. *Burford*, 339 U. S. 200, or *Ex parte Hawk*, 321 U. S. 114, adopted the rationale that after exhaustion of state remedies by a petitioner seeking a writ of habeas corpus from a federal district court to review the validity of his custody under a state judgment, a federal district court *must* entertain such petition. Under the majority opinion of this court in the *Darr* case, the federal district judge has the discretion to review such petition and dismiss it where on its face no substantial federal question is presented and no extraordinary circumstances of peculiar urgency are disclosed.

> *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17; 46 S. Ct. 1, 3; 70 L. Ed. 138.

In *Darr* v. *Burford*, 339 U. S. 200, at 214, this court stated:

> "On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner. Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds, and repeated adjudications of the same issues by courts of coordinate powers."

In the case at bar the district court after an examination of the application and the prior proceedings of which it could take judicial notice (*U. S. ex rel Wing* v. *Com.* (D. C. Pa. 1950), 90 F. Supp. 208;

Knight v. *People*, 60 F. Supp. 164) found that the applicant had not alleged exceptional circumstances of peculiar urgency which would tend to show that notwithstanding the strong presumption of constitutional regularity in state judicial proceedings that the prosecution by the State in his case so departed from constitutional requirements as to justify a federal court's intervention to protect his rights.

If we adopt the reasoning of the ninth circuit court opinion in the case at bar, we compel federal district courts to fully consider every petition for habeas corpus presented by applicants in state custody under state judgments who have alleged exhaustion of state remedies, regardless of the merit of the contentions urged. We must therefore assume that the states, which have the major responsibility for the maintenance of law and order within their borders, have failed to maintain their role as guardians of the administration of justice. This assumption is not in accord with the principles of *Ex parte Hawk*, 321 U. S. 114, or *Darr* v. *Burford*, 339 U. S. 200, at 217, where this court stated:

> "It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court."

Where, as here, the merits of a petitioner's application have been considered by the state courts and

certiorari denied by this court, due respect for the delicacies of the relationship between the United States and its courts and the states and theirs would require the federal courts to withhold relief in state custody cases until it is made to appear that the state has not afforded a constitutionally adequate opportunity to prove the factual basis for a constitutional contention unless "exceptional circumstances of peculiar urgency are shown to exist."

The area of judicial discretion vested in the district courts after state remedies have been exhausted should be limited to the evaluation of the urgency of any exceptional circumstances which may be present in a particular case. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and this court has denied a review of their action on certiorari. This would permit a federal district court to review not only the decisions of the highest state courts but also of this court as a matter of course. The reasoning adopted by the Ninth Circuit Court of Appeals is contrary to that adopted by the courts of the second and fourth circuits on similar problems (*Adkins* v. *Smith* (4 Cir.), 188 F. 2d 452; *Schechtman* v. *Foster* (2 Cir.), 172 F. 2d 339 (cert. den. 339 U. S. 924, 70 S. Ct. 613, 94 L. Ed. 1346); *Goodman* v. *Swenson* (4 Cir.), 173 F. 2d 349).

Chief Judge John J. Parker, of the Court of Appeals for the Fourth Circuit, who served as Chairman of the Judicial Conference of Senior Circuit Judges, Committee on Habeas Corpus, the recommendations of which committee ultimately were enacted into law by Congress, discusses Section 2254 in his article "Limiting the Abuse of Habeas Corpus" 8 Fed. Rules Dec. 171-178 (1948), and states:

> "The effect of this last provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts in all states in which successive applications may be made for habeas corpus to the state courts; for in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari.
>
> "The thing in mind in the drafting of this section was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction."

The Ninth Circuit Court of Appeals in its amended opinion of January 30, 1952 (*Ekberg* v. *McGee*, 194 F. 2d 178), at page 180, stated:

> "The appellee also contends that appellant has not exhausted his state remedies because under the California Law a decision on a petition for the

writ of habeas corpus is not res judicata of the issues raised by the petition and hence successive petitions may be filed making the state process inexhaustible. We do not agree that in California the process is inexhaustible. The contrary is decided in Re Horowitz, 33 Cal. 2d 534, 547, 203 P. 2d 513, and in Re Browning, 99 Cal. App. 2d 337, 221 P. 2d 736."

In the case of *In re Horowitz*, 33 Cal. 2d 534, 203 P. 2d 513, in which an application for a writ of habeas corpus was consolidated with an appeal from an order denying a petition for writ of error coram nobis, it appeared that the petitioner had previously taken an appeal from the judgments of conviction and the appellate court affirmed these judgments (*People* v. *Horowitz*, 70 C. A. 2d 675, 161 P. 2d 833). His petitions for rehearing and hearing by the supreme court were denied. The applicant then petitioned the Los Angeles Superior Court for a writ of habeas corpus and writ of error coram nobis. The superior court issued the writ of habeas corpus and after a hearing discharged the writ and denied the petition for coram nobis. His appeal from the denial of the writ of error coram nobis was dismissed. Petitioner then applied to the California Supreme Court for a writ of habeas corpus. This was denied without opinion. Then the action resulting in the cited decision was instituted based primarily on the same grounds as the previous proceedings, namely, the contention that the prosecution used false and perjured evidence with knowledge of its character to procure the petitioner's conviction.

The California Supreme Court in discharging the writ of habeas corpus, stated: (33 C. 2d 534, at 546)

> "Furthermore, certain grounds of the petition were presented by the previous application to this court for habeas corpus, and it appears that all grounds now urged were then known to petitioner. It is the policy of this court to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where there is shown no change in the facts or the law substantially affecting the rights of the petitioner. (*In re Miller* (1941), 17 Cal. 2d 734, 735 (112 P. 2d 10); *In re De La Roi* (1946), 28 Cal. 2d 264, 275 (169 P. 2d 363).) And as to the presentation of new grounds based on matters known to the petitioner at the time of previous attacks upon the judgment, in *In re Drew* (1922), 188 Cal. 717, 722 (207 P. 249), it was pointed out that the applicant for habeas corpus 'not only had his day in court to attack the validity of this judgment, but . . . had several such days, on each of which he could have urged this objection, but did not do so'; it was held that 'The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose.'"

The case of *In re Browning*, 99 C. A. 2d 337, 221 P. 2d 736, merely held that the judgment of the superior court discharging a petition for writ of habeas corpus to secure custody of a minor is res judicata in a subsequent habeas corpus proceeding in the district court of appeal in which no new or additional facts are presented.

Neither of these cases, however, compels the conclusion that an applicant may not file successive applications for writs of habeas corpus in the state courts. In the case of *In re Swain,* 34 C. 2d 300, 209 P. 2d 793, the California Supreme Court in denying a petition for writ of habeas corpus to secure the release of a prisoner from custody where the petitioner had previously unsuccessfully sought three writs in the state courts, three in the federal district courts, and two petitions for writ of certiorari in this court, stated:

> "It should be noted that no question of the abuse of the writ of habeas corpus is before us (*cf., Price* v. *Johnston* (1947), 334 U. S. 266, 286 (68 S. Ct. 1049, 92 L. Ed. 1356)), and that our determination that the vague, conclusionary allegations of the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (*cf., Pyle* v. *Kansas* (1942), 317 U. S. 213, 216 (63 S. Ct. 177, 87 L. Ed. 214); *Williams* v. *Kaiser* (1944), 323 U. S. 471 (65 S. Ct. 363, 89 L. Ed. 398); *Tompkins* v. *Missouri* (1944), 323 U. S. 485 (65 S. Ct. 370, 89 L. Ed. 407); *Rice* v. *Olson* (1944), 224 U. S. 786 (65 S. Ct. 989, 89 L. Ed. 1367)). We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria

> persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.
>
> "The application for the writ is denied without prejudice to the filing of a new petition which shall meet the requirements above specified."

There is no question that even under the California cases cited in the opinion of the Ninth Circuit Court of Appeals that if there is any change of facts or law affecting an applicant's case since the filing of his previous application for a writ of habeas corpus he would be entitled to bring the matter again before the California courts (*In re Horowitz*, 33 C. 2d 534, 203 P. 2d 513). It is not a question of res judicata but an abusive use of the writ of habeas corpus which is frowned on by the California courts.

Thus petitioner herein submits that the action taken by the Ninth Circuit Court of Appeals in the instant matter is based upon fallacious reasoning and fails to accord to Section 2254, Title 28 U. S. C., the interpretation meant to be given by the draftsmen thereof and also fails to recognize the principle of comity enunciated by this court in *Ex parte Hawk*, 321 U. S. 114, and *Darr* v. *Burford*, 339 U. S. 200.

III. The Ninth Circuit Court of Appeals by Its Decision Has Refused to Give Any Weight to the Denial of Certiorari by This Court of the Highest State Court's Decision in the Same Matter

The decision of the Ninth Circuit Court of Appeals in the case at bar points out that the applicant has

presented the same points sought to be raised in the instant petition addressed to the federal district court as were before the state courts and this court when his petition for certiorari was denied. While this court has many times stated that the denial of a petition for certiorari is not an adjudication upon the merits of a case (*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917; *United States* v. *Carver*, 260 U. S. 482, 490), nevertheless these cases did not involve the question of exhaustion of state remedies for purposes of seeking writs of habeas corpus from lower federal courts. In *Darr* v. *Burford*, 339 U. S. 200, this question was unanswered. In the present case the issue is squarely presented.

If review upon certiorari by this court is to be considered as an integral part of the state procedure for exhaustion of state remedies, then some weight should be given to the fact that this court after an examination into the substance of a prisoner's protest against unconstitutional detention did not find existent such circumstances showing a gross violation of the applicant's constitutional rights.

This court stated in *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572:

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated."

This language has been cited by the various circuit courts. Some have given the denial of certiorari conclusive effect, others have given the denial discretionary weight and in other instances no substantive weight whatsoever has been given (46 Illinois Law Review 478-488).

The ninth circuit court in the *Ekberg* case has given the denial of certiorari no weight whatsoever, contrary to its position taken in the case of *Tate* v. *Heinze*, 187 F. 2d 98. Clearly, the adoption of this viewpoint would set at nought this court's determination in the very case that the local system for the administration of justice squares with federal constitutional requirements. This would render meaningless the requirement of this court that exhaustion of state remedies requires an application for certiorari to this court and permit a federal district court to consider anew without the existence of any extraordinary circumstances the same matters that have hitherto been presented to the highest state courts and the highest court of the United States. This viewpoint would not be according "due process" to the states.

CONCLUSION

Petitioners respectfully urge that this court reverse the decision of the Ninth Circuit Court of Appeals in this matter by establishing a criterion for district courts to follow in cases where, as here, a petition for writ of habeas corpus on its face does not disclose a substantial federal question or circumstances of

peculiar urgency but where the petition merely alleges an exhaustion of state remedies.

The decision of the Ninth Circuit Court of Appeals in the instant matter fails to recognize that upon habeas corpus in a federal court, the court does not review the decision of the state courts. The writ is limited to the assertion of the applicant's rights under the Fourteenth Amendment and due process of law does not require infallible process of law. Where, as here, the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights. Patently, where on the face of his petition for writ of habeas corpus an applicant does not present a substantial federal question or extraordinary circumstances of peculiar urgency after showing an exhaustion of state remedies, a federal district court should be allowed the discretion to deny such petition without entertaining further proceedings in the matter.

The course adopted by the decision of the Ninth Circuit Court of Appeals would place upon the federal district courts—such as that in the Northern District of California, where two state prisons are located containing some thousands of inmates who have discarded the former idea of escape through "jail break" for the modern approach through petitions for writs of habeas corpus—a tremendous burden which would not assist in the orderly administration of justice but which, on the contrary, would impede it.

Persistence in the reasoning contained in the opinion under review would reduce the highest appellate courts of the State of California to an intermediate court subject to the appellate supervision and control of the judges of the United States district courts in every case. We submit that in the organization of the dual state and federal system such a situation was never contemplated.

The writers of this brief have never been accused of being dervishes whirling before the shrine of state's rights and we are not now basing our argument on any attenuated theory of the supremacy of the state judicial systems.

All we ask or contend for is that after a decision of the highest state tribunal has been subjected to review by this court and relief has been denied without opinion, further review by the district courts shall not be available except where the state appellate process is inadequate or extraordinary circumstances intervene to compel action by the district court.

For the reasons stated, it is respectfully submitted that the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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writ of habeas corpus upon the ground that the cause is moot. *Doris H. Maier*, Deputy Attorney General of California, argued the cause for petitioners. With her on the brief were *Edmund G. Brown*, Attorney General, and *Clarence A. Linn*, Assistant Attorney General. *Allan L. Sapiro* argued the cause and filed a brief for respondent. Reported below: 194 F. 2d 178.

JUNE 9, 1952.

Per Curiam Decisions.

No. 517. McGEE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* EKBERG. Certiorari, 342 U. S. 952, to the United States Court of Appeals for the Ninth Circuit. Argued April 28, 1952. Decided June 9, 1952. *Per Curiam:* The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition for